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Supreme Court, U.S.
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IN THE
Supreme Court of the United States

October Term, 1986

CITY OF PADUCAH: JOHN K. PENROD, as Mayor, and JOE VITERISI, ROBERT A. COLEMAN, HAROLD (SHORTY) FORD and JAMES W. FLYNN, as Commissioners of said City: JAMES W. UTTER, as Corporation Counsel, and THURMAN BAKER, as Treasurer thereof,

Petitioners,

v.

INVESTMENT ENTERTAINMENT, INC.;
BELTLINE NEWS AND ARCADE CLUB,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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23 pp

QUESTIONS PRESENTED

I

Whether The Tests Established By This Court In Watson v. Buck, 313 U.S. 387 (1941), and Huffman v. Pursue, Ltd., 420 U.S. 592 (1973) and Middlesex County Ethics Committee v. Garden State Bar Ass'n., 457 U.S. 423 (1982), As Applied To The Trial Record Herein 1/ Required The U.S. District Court To: (1) Abstain; (2) Grant The City Of Paducah's Summary Judgment Motion; (3) Dismiss The Civil Rights Action Which Sought To Invalidate The City Of Paducah's Newly-Enacted Public Nuisance Ordinance No. 83-6-2388; And (4) Remand The Public Nuisance Abatement (Obscenity) Action To The State Court For Trial On The Merits?

1/ The trial record disclosed the following:

(1) The City of Paducah Ordinance No. 83-6-2388 was newly enacted, contained a severability clause, and involved two important state interests, i.e., abatement of a "per se" public nuisance and the construction to be given such Ordinance by the State Court;

(2) Neither the U.S. District Court nor the Court of Appeals had made the necessary finding to support an exception to Watson v. Buck, i.e., that the Ordinance was "flagrantly and patently violative of express constitutional prohibitions in every clause, sentence, and paragraph and in whatever manner and against whomever an effort might be made to apply it;

(3) The City filed a timely public nuisance abatement action in the State Court and that forum was available for a resolution of the identical issues; and

(4) Proof of "exceptional circumstances" and "great immediate danger of irreparable loss" is lacking in that: (a) the terms of the Ordinance precluded the use of the criminal process, (b)

II

Whether Paducah Ordinance 83-6-2388 Is Facially Unconstitutional As A "Prior Restraint" On Free Speech So As To Authorize Federal Interference; That Is,

(a) Whether The City Of Paducah, Under Its Nuisance Abatement Powers, Has The Power To Enact A Procedural Public Nuisance Ordinance Which Declares A Place Of Business In Which Obscene Publications Constitute Either: (1) All Of The Stock In Trade, Or (2) A Principal Part Of The Stock In Trade, To Be A Public Nuisance Per Se; and;

(b) Whether Under Such A Procedural Public Nuisance Ordinance, The City May Act To Revoke All Licenses And Permits Of Such Business Where: (1) No Criminal Proceedings May Be Brought For Transacting Business Without A License Unless And Until The Existence Of Such Public Nuisance Has Been Established At A Trial On The Merits, And The License Revocation Confirmed By A Decree Of The McCracken Circuit Court In Judicial Proceedings Brought By The City For That Purpose, Within Five (5) Days After Passage Of Said Resolution; And Where: (2) The Trial Judge Has Equitable Discretion To Confirm Or Deny Such License Revocation?

(footnote continued)
restricted the law enforcement remedy of the City to its use of a civil public nuisance abatement lawsuit and license revocation, which (c) does not take effect until after a trial on the merits and a finding that the place of business was one in which obscene publications constituted either: (1) all of the stock in trade or (2) a principal part of the stock in trade, and (d) the trial judge has equitable discretion to confirm or deny the license revocation.

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IN THE

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October Term, 1986

CITY OF PADUCAH: JOHN K. PENROD, as Mayor, and JOE VITERISI, ROBERT A. COLEMAN, HAROLD (SHORTY) FORD and JAMES W. FLYNN, as Commissioners of said City: JAMES W. UTTER, as Corporation Counsel, and THURMAN BAKER, as Treasurer thereof,

Petitioners,

v.

INVESTMENT ENTERTAINMENT, INC.; BELTLINE NEWS AND ARCADE CLUB,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The petitioners City of Paducah, et al. respectfully pray that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Sixth Circuit in the removed state lawsuit, No. C83-0217-P(J) being City of Paducah v. Investment Enter-

tainment, Inc., McCracken Circuit Court, and the Civil Rights Actions Investment Entertainment, Inc., (No. 85-5092) and Beltline News and Arcade Club, (No. 85-5093) v. City of Paducah, et al., entered on May 28, 1986.

OPINIONS BELOW

The memorandum opinion of the United States District Court for the Western District of Kentucky at Paducah (Edward H. Johnstone, District Judge) is reprinted in Appendix "B" to this petition.

The opinion of the Court of Appeals for the Sixth Circuit is reprinted in Appendix "A" to this petition.

JURISDICTION

Invoking federal jurisdiction under 42 U.S.C. section 1983, 28 U.S.C. section 1343(a), and 28 U.S.C. section 2201, Investment Entertainment, Inc., and Beltline News and Arcade Club brought separate civil rights actions in the

United States District Court for the Western District of Kentucky at Paducah, seeking a declaratory judgment and injunctive relief that Paducah's Public Nuisance Ordinance 83-6-2388 was unconstitutional both on its face and as applied to the plaintiff, and that the license revocation provision of the ordinance constituted a "prior restraint" on free speech. (See Appendix "E" for Investment Entertainment, Inc.'s complaint).

Alleging diversity of citizenship, Investment Entertainment, Inc., successfully removed the state court public nuisance abatement action pending against it to the federal district court. Beltline's attempted removal was unsuccessful because there was no diversity of citizenship. The District Court then consolidated all three (3) actions.

In an attempt to get the legal proceedings back into the state court system,

the City of Paducah answered and moved for a Summary Judgment. In its answer, (see Appendix "G"), the City of Paducah pleaded as a first defense that the complaint failed to state a claim upon which relief can be based under the Civil Rights Statute, 42 U.S.C. section 1983; as a fourth defense that the Federal District Court should abstain from further proceedings until a final determination was made on the application of the ordinance in the City's civil action filed in the McCracken Circuit Court; and as a fifth defense that no "prior restraint" existed in applying the ordinance, in that a circuit court trial on the merits was required before any licenses could be revoked by the City of Paducah. The Federal Court denied the City's Motion for Summary Judgment and sustained the Motion for Summary Judgment of the two federal plaintiffs.

The opinion of the Court of Appeals was filed on May 28, 1986. This Court's jurisdiction is invoked under 28 U.S.C. section 1254(1) and rule 17.1(a) and 17.1(c) of the U.S. Supreme Court, being in conflict with a state court of last resort, State of Idaho ex rel. Kidwell v. U.S. Marketing, 102 Idaho 431, 631 P.2d 622 (1981) and with the principles expressed in a recent decision of this Court during the October Term, 1985, in Arcara, District Attorney of Erie County v. Cloud Books, Inc., etc., et al., ____ U.S. ____, 54 L.W. 5060 (July 7, 1986).

CITY ORDINANCE INVOLVED

The text of City of Paducah Ordinance No. 83-6-2388, enacted by the Board of Commissioners on June 14, 1983, is set forth at Appendix "C" to this petition.

STATEMENT OF THE CASE

The appeal herein presents this Court with the question which was left

unanswered by this Court's recent decision on July 7, 1986 in Arcara, District Attorney of Erie County v. Cloud Books, Inc., etc., et al., ____ U.S. ____, 54 L.W. 5060 (July 7, 1986). Here, the unlawful conduct and activities giving rise to the public nuisance abatement action, which the City Attorney was prepared to prove in the State action below and which was removed to the federal court, is the maintenance of a public nuisance in the form of a place of business in which obscene publications constitute all of the stock in trade, or a principal part of the stock in trade. See Arcara, 54 L.W. at 5061.

Petitioners City of Paducah et al. contend that the federal judiciary have unlawfully interfered with the City's legislative process and right under Watson v. Buck, 313 U.S. 387 (1941), Huffman v. Pursue Ltd., 420 U.S. 592

(1975), and Middlesex County Ethics Committee v. Garden State Bar Association, 457 U.S. 423 (1982) to have newly enacted Paducah Ordinance No. 83-6-2388 which contains a severability clause, construed initially by the state court system. Newly enacted Ordinance No. 83-6-2388 is not "flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it", so as to permit federal interference. The federal court was required to abstain. Watson v. Buck, 313 U.S. 387 (1941); Ohio Civil Rights Commission et al. v. Dayton Christian Schools Inc., et al., 476 U.S. ____, 91 L.Ed.2d ____, 54 L.W. 4860 at 4862 (June 27, 1986).

Petitioners further contend that the test established by this Court in U.S. v. O'Brien, 391 U.S. 367 is

inapplicable to Paducah Ordinance No. 83-6-2388, inasmuch as O'Brien has no relevance to an ordinance directed at imposing sanctions on non-expressive activity (a place of business which is a manufactory of obscene materials)[1/]; and that the sections held to be unconstitutional below, namely, those

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1/
See Arcara, supra, 54 L.W. at 5062:

"The New York Court of Appeals held that the O'Brien test for permissible governmental regulation was applicable to this case because the closure order sought by petitioner would also impose an incidental burden upon respondents' bookselling activities. That court ignored a crucial distinction between the circumstances presented in O'Brien and the circumstances of this case: unlike the symbolic draft card burning in O'Brien, the sexual activity carried on in this case manifests absolutely no element of protected expression. In Paris Adult Theater I v. Slaton, 413 U.S. 49, 67 (1973), we underscored the fallacy of seeking to use the First Amendment as a cloak for obviously unlawful public sexual conduct by the diaphanous device of attributing protected expressive attributes to that conduct. First Amendment values may not be invoked by merely linking the words 'sex' and 'books'."

declaring such places (as distinguished from "subject matter") to be public nuisances per se; and the sections revoking all licenses and permits,were valid and do not constitute "prior restraints".

STATEMENT OF FACTS

INTRODUCTION

On June 14, 1983, the Board of Commissioners of Paducah, Kentucky, adopted a new procedural ordinance which applied civil public nuisance controls to the commercial exploitation of obscene subject matter, i.e., businesses that trade principally in obscene materials, and declared such places to be public nuisances per se. A copy is attached at Appendix "C" to this petition.

The ordinance adopted by Paducah is based upon a public nuisance "prototype" ordinance upheld as a procedural ordinance in People ex rel. Camil v. Buena Vista Cinema, 57 Cal.App.3d 497, 129 Cal.Rptr.

315 (1976). Additionally, Paducah's public nuisance abatement ordinance is similar to the public nuisance ordinance which was upheld by the United States District Court, Western District of Pennsylvania in Eastern Books v. Bagnoni, 446 F.Supp. 643 (1978). A similar scheme for a state public nuisance abatement "prototype" statute was upheld in State of Idaho ex rel. Kidwell v. U.S. Marketing, 102 Idaho 431, 631 P.2d. 622 (1981).

Ordinance 83-6-2388 is not directed at businesses which may possess a few items of "obscene" material as a part of their stock in trade. Obscene subject matter has not been made a public nuisance by the Ordinance unless and until the place of business itself is first found to be a public nuisance under the ordinance, that is, a place of business in which obscene publications constitute all of the stock in trade, or a principal

part of the stock in trade. See Appendix "C" at section 19-153(B).

Again, in the case of the exhibition of films at a theater, the place (theater) is the public nuisance, see Appendix "C" at sections 19-152(A) and 19-152(B), and the films must be "publicly exhibited as a regular course of business", or a film must be "publicly and repeatedly exhibited" at a "place" which has been found to be a public nuisance before such films (if found to be obscene) would be designated as "public nuisances" within the Ordinance. See Appendix "C" at section 19-152(C).

Two months after adoption of the ordinance, the Board of Commissioners conducted a public hearing and reviewed specific examples of materials which had been purchased from a place of business known as Investment Entertainment, Inc., and heard the testimony of the investi-

gating officer regarding the content and character of the general stock in trade of such business.

Following the public hearing on August 3, 1983, at which a representative of Investment Entertainment, Inc. was invited to appear, the Board of Commissioners adopted a resolution finding that the place of business was a public nuisance pursuant to section 19-153(A) and that the specific materials which had been purchased and all of the stock in trade of that place of business was obscene and a public nuisance under section 19-153(B) of the City of Paducah, being "obscene publications" possessed at a place of business which is a public nuisance under section 19-153(A), and ordered the corporation counsel, pursuant to section 19-156, to instigate judicial proceedings within 5 days to abate such public nuisance and to obtain judicial

confirmation of the City Commissioner's license revocation. The resolution (see Appendix "D") revoked all licenses and permits. Under section 19-155(D) of the Ordinance, such revocation by the City Commissioners was made subject to confirmation by the McCracken Circuit Court in judicial proceedings. Said section provides further that "criminal proceedings for transacting business without a license at such address shall not be filed until the order of license revocation by the Board of Commissioners has been confirmed by judicial order."

Under Paducah Ordinance 83-6-2388, the resolution of the City Commissioners is simply a written memorialization of the executive decision of the City's Board of Commissioners to file a lawsuit. The commission was not required to examine all of the stock in trade, but could take into account the testimony of the

investigating officer to the effect that all of the stock in trade was substantially the same as that purchased at random and examined by the Commissioners.[2/]

However, under the City's "Burden of Proof" in the State Court action, the City is required to prove that all of the stock in trade, or a principal part thereof is obscene. Further, the question as to whether the license revocation should be "confirmed" would be a matter within the "equitable discretion" of the trial judge. The trial judge is

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2/ See Appendix "B", herein, where U.S. District Court Judge Johnstone stated:

"The only effect of the Board's action was the initiation of judicial proceedings against Investment. The ordinance recognizes that all final and binding determinations must be made by the court involved in the judicial proceedings. Due process does not require that decisions to initiate judicial proceedings be made pursuant to some type of evidentiary standard or that they be made only after notice has been given to the affected parties. Viewed strictly as a means of determining when to initiate judicial proceedings, the ordinance does not violate due process. See Buena Vista Cinema, 129 Cal.Rptr. 315, 318 (Cal.Ct.App. 1976).

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not required to confirm the Commissioners' revocation. There is no "ordinance" or "statute" which mandates the trial judge to act in a particular fashion. Compare section 2329 of the New York Public Health Law in Arcara, supra, which requires closure of a building found to be a nuisance under 2320.

On the same date that the public hearing was conducted, and at which its representation was invited, (August 3, 1983) Investment Entertainment, Inc. filed a civil rights complaint in the United States District Court for the Western District of Kentucky, see Appendix "E" to this petition, requesting the court to enjoin Paducah from enforcing Ordinance No. 83-6-2388, alleging that the ordinance was unconstitutional on its face and as applied, and that the provisions of said ordinance

and the enforcement procedures set forth therein, constitute an unconstitutional "prior restraint" and a deprivation of plaintiff's rights, liberty and property without due process of law.

One week after the public hearing (August 10, 1983) Paducah filed a civil complaint in the McCracken Circuit Court (see Appendix "F" to this petition) asking the state court to determine that the place of business operated by Investment Entertainment, Inc., is a public nuisance, and that the action taken by the Board of Commissioners to revoke the licenses issued to that place of business was lawful, and that any obscene films be forfeited as contraband.

On August 16, 1983 Paducah answered the federal complaint. In its answer, see Appendix "G" to this petition, Paducah pleaded as a first defense that the complaint failed to state a claim upon

which relief can be based under the civil rights statute, 42 U.S.C. section 1983; as a fourth defense, that the Federal District Court should abstain from further proceedings until a final determination was made on the application of the ordinance in the City's civil action filed in the McCracken Circuit Court; and as a fifth defense, that no "prior restraint" existed in applying the ordinance, in that a circuit court trial on the merits was required before any licenses could be revoked and then, only after the trial court, sitting in Equity, had exercised its equitable discretion to confirm or deny the license revocation.

One week later (August 17, 1983) Investment Entertainment filed a petition for removal to the United States District Court. On October 3, 1983, the District Court consolidated the two actions into

Civil Action No. 83-0208P(J). Investment answered the state action and counter-claimed against Paducah under the Civil Rights Statute, to which Paducah replied.

BELTLINE NEWS AND ARCADE CLUB

As to Beltline, the proceedings in the federal and state courts were similar to Investment, except that the District Court found that there was no diversity of citizenship and remanded the City's complaint against Beltline to the McCracken Circuit Court, where said action is still pending.

In both federal lawsuits, all of the parties filed motions for summary judgment. A copy of the four (4) Summary Judgment Motions is attached at Appendix "H" to this petition.

On January 5, 1985, the Hon. Edward H. Johnstone, Judge of the United States District Court, entered a memo-

randum opinion in Investment Entertainment v. City of Paducah in which he held that Paducah did not have the power to declare a manufactory of obscene materials to be a place which was a public nuisance.[3/]

Judge Johnstone noted that the opinion of the Idaho Supreme Court in State ex rel. Kidwell v. U.S. Marketing, 102 IDAHO 431 (1981), provided contrary authority which he chose not to follow. See Appendix "B" at page B-18.

3/ See Appendix "B", herein, reading in part:

"Investment does contend that Ordinance No. 83-6-2388 declares property to be a public nuisance in a way which impermissibly punishes non-obscene, protected speech. The court agrees"; and,

"On the other hand, non-obscene materials are entitled to great protection, and therein lies the danger of Ordinance No. 83-6-2388. By going beyond the obscene materials themselves and focusing on the place where the obscene materials are sold or exhibited, the ordinance improperly intrudes upon protected expression. Because of this focus on places rather than materials, the court finds that Section 19-152(A) and (B) and Section 19-153(A) are unconstitutional."

Judge Johnstone's memorandum of opinion in Beltline, entered on January 7, 1985, adopted his memorandum opinion in the Investment case.

On January 7, 1985, the District Court sustained the Motion of Beltline for Summary Judgment in Beltline News and Arcade Club Inc. v. City of Paducah, et al., and declared Sections 19-152 and 19-153 of Ordinance No. 83-6-2388 to be unconstitutional and enjoined their enforcement. On January 8, 1985, the District Court entered substantially the same Order in Investment Entertainment Inc. v. City of Paducah, et al.

On January 29, 1985, Paducah filed notices of appeal. On May 28, 1986 the Court of Appeals filed its opinion. See Appendix "A" to this petition.

The Court of Appeal did not discuss Judge Johnstone's proposition of law that Paducah did not constitutionally possess

the power to declare a "place of business in the City of Paducah in which obscene publications constituted all of the stock in trade, or a principal part thereof" to be a per se public nuisance. The Court of Appeals' majority opinion held the ordinance to be facially invalid, and affirmed the U.S. District Court judgment on the Court of Appeals' interpretation that the revocation of all licenses and permits "is a prior restraint of plaintiff's freedom of expression."[4/]

4/ See Appendix "A", herein, reading in part:

> "No doubt one of the purposes of Paducah's license revocation ordinance is to deter the sale and exhibition of obscene material. But the ordinance goes beyond this purpose as District Judge Johnstone found. The main thrust of the abatement procedure is the revocation of all licenses and permits under which the business in question operates. Even under the so-called padlock laws, a business operator remains free to engage in protected expression in another location. Paducah's

The Court of Appeals did not analyze section 19-153(A) of the ordinance which provides that "Where such obscene publications constitute only a part of the stock in trade and are located in a place or places within such business which are capable of demarcation, such place or places constitute the public nuisance which requires abatement". Paducah submits that a reasonable (state court) interpretation of section 19-153(A) would hold that (1) the balance of the stock in trade (nonobscene) does not require

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procedure of revoking business licenses is more restrictive in that it essentially prevents the offending business from engaging in future distribution of protected, nonobscene material anywhere within the City of Paducah. We therefore conclude that the ordinance's use of license revocation as a weapon against obscenity goes beyond merely deterring or punishing individuals who deal in obscene material. The ordinance's purpose, as evidenced by the license revocation provision, is to control future expression by businesses that have been subjected to the nuisance abatement procedure. The ordinance is a prior restraint of plaintiff's freedom of expression."

abatement, and (2) that once the offending stock in trade is abated, (a) the trial court would be authorized to exercise its discretion and decide the license need not be revoked or, if revoked by the Court that, thereafter, (b) an application for a new license would be considered by the City if the unlawful place of business had been abated. See Art Theater Guild Inc., et al., v. Ohio ex rel. Ewing, 37 Ohio St.2d 95, 307 N.E.2d 911 (February 27, 1974); appeal dismissed for want of a substantial federal question in Art Theater Guild Inc., et al., v. Ohio ex rel. Ewing, 421 U.S. 923, 44 L.Ed.2d 82, 95 S.Ct. 1649 (April 21, 1975). The Court of Appeals also noted that it would decline to address the severability question.

SUMMARY OF ARGUMENT

I.

Under Watson v. Buck, Huffman v. Pursue, Ltd., and Middlesex County Ethics Committee v. Garden State Bar Association, the federal court was required to abstain and dismiss the federal civil rights action in order that the state court might be given an opportunity in the state action to render an initial construction (including severance) of the newly enacted Paducah public nuisance abatement ordinance.

Where abstention is pleaded as a defense to a federal action challenging the constitutionality of a newly enacted city ordinance which is also the subject of a state complaint in a state court, the federal court must abstain unless it is shown that the challenged ordinance is "flagrantly and patently violative of express constitutional prohibitions in

every clause, sentence, and paragraph and in whatever manner and against whomever an effort might be made to apply it."; that is, the plaintiff must be able to show that the city ordinance could not be rendered constitutional by any decision of the state court.

To establish an exception to abstention under Watson v. Buck, one must show "exceptional circumstances" and "great and immediate danger of irreparable loss". Such an exception is lacking here where the terms of the Paducah public nuisance abatement ordinance: (a) preclude the use of the criminal process, (b) restrict the city to its use of the civil remedy of a public nuisance abatement lawsuit, (3) provide that license revocation does not take effect until after a trial on the merits, and a finding that the place of business was one in which obscene publications constitute

all of the stock in trade or a principal part of the stock in trade, and where (4) a trial court has discretion to confirm or deny the license revocation.

Under Younger-Huffman abstention, the federal court may not retain jurisdiction, but must dismiss the federal civil rights complaint.

Not every civil rights complainant is entitled to one unencumbered opportunity to litigate his federal right in a federal district court.

Under Middlesex County Ethics Committee v. Garden State Bar Association, 457 U.S. 423, federal abstention is mandated whenever the challenged city ordinance involves an important state interest which is involved in a pending state court action in which the constitutional challenges can be raised, and there is no bad faith, harrassment, or some other extraordinary circumstances.

Paducah did not waive its defense of abstention or consent to federal jurisdiction. See Ohio Civil Rights Commission, et al. v. Dayton Christian Schools, Inc., et al., 476 U.S. ____, 54 L.W. 4860 at 4862 (June 27, 1986). On the contrary, Paducah asked the federal court to grant summary judgment on its abstention defense.

Practical reasons require abstention: (1) a federal court lacks jurisdiction to authoritatively construe state legislation; (2) state and federal courts approach the task of statutory construction from an entirely different perspective; (3) the question as to whether a city ordinance is severable is more properly a matter for the state court, and (4) federal interference promotes judicial inefficiency.

II.

Paducah Ordinance 83-6-2388 is not

unconstitutional on its face in the "sense" of Watson v. Buck. Contrary to the conclusion of law expressed by United States District Judge Johnstone, the City of Paducah possesses the historic common law power of cities to declare a place of business which is a "manufactory of obscere materials" to be a moral public nuisance.

Further, an ordinance which revokes all licenses and permits of a place of business which is a per se moral public nuisance does not constitute an unlawful "prior restraint". It represents a proper implementation of the governmental power of a city to license places of "lawful businesses" and to revoke licenses of places of "unlawful businesses".

The Paducah Ordinance controls places of business which are immoral public nuisances, and not "writings". Accordingly, the Paducah ordinance is unrelated to ex-

pressive activity and the test for permissible governmental regulation expressed in U.S. v. O'Brien is inapplicable for the reasons given in Arcara.

The right of cities to legislate in the area of public nuisances is historic. The right of a court to pass upon the correctness of the revocation of a license is fundamental.

The Civil Rights Action also failed to state sufficient facts to constitute a claim upon which federal relief can be based.

REASONS FOR GRANTING THE WRIT

I

UNDER THE TRIAL FACTS AND THE PRINCIPLES EXPRESSED BY THIS COURT IN WATSON v. BUCK, HUFFMAN v. PURSUE LTD. AND MIDDLESEX COUNTY ETHICS COMMITTEE v. GARDEN STATE BAR ASS'N., THE FEDERAL JUDICIARY WAS REQUIRED TO ABSTAIN AND DISMISS THE FEDERAL CIVIL RIGHTS ACTION.

Under the principles expressed by this Court in Watson v. Buck, 313 U.S. 387 (1941); Huffman v. Pursue Ltd., 420 U.S. 592 (1975); and Middlesex County Ethics Committee v. Garden State Bar Ass'n., 457 U.S. 423 (1982); the federal judiciary was required to abstain and dismiss the federal civil rights action.

I(A) Under The Trial Facts, The Test In Watson v. Buck Is Controlling And Must Be Applied.

In Watson v. Buck, 313 U.S. 387 (1941), the District Court for the Northern District of Florida had enjoined a Florida Statute containing a severability

clause which had never been before the Florida Supreme Court for interpretation. In reversing that judgment and the granting of the injunction, Justice Black speaking for the U.S. Supreme Court, held at pages 401-402 that a state statute which contains a severability clause must be "flagrantly and patently violative of express constitutional prohibitions in every clause, sentence, and paragraph, and in whatever matter and against whomever an effort might be made to apply it. . ." before a federal court can interfere with the right of the state court to interpret such legislation.

Because Paducah Ordinance No. 83-6-2388 was new legislation containing a severability clause which was the subject of a declaratory judgment action in the state court which was about to construe it for the first time, and because neither the U.S. District Court nor the

Court of Appeals' opinions made a finding that the ordinance was unconstitutional on its face, in the sense that it was "flagrantly and patently violative of express constitutional prohibitions in every clause, sentence, and paragraph, and in whatever matter and against whomever an effort might be made to apply it" the ordinance must be tested by the rule expressed in Watson v. Buck. In such a case, it is reversible error for a federal court to grant an injunction and preempt the state court from its function, unless the record shows there were "exceptional circumstances and a clear showing that an injunction is necessary in order to afford adequate protection of constitutional rights. . . ." Further, under Watson v. Buck, that "clear showing" must demonstrate that the danger of irreparable loss "is both great and immediate." --- otherwise the defenses

must be set up in the state court even though the validity of the ordinance is challenged, for there is ample opportunity for ultimate review by the U.S. Supreme Court of federal questions.

Paducah submits that, because the City may not use the criminal process, and has the burden of proof in the pending state civil public nuisance abatement lawsuit of establishing the existence of such public nuisance in a trial on the merits before the license revocation may be considered by the trial judge and confirmed or denied by him in the trial court's discretion, it is patent upon the face of Paducah Ordinance 83-6-2388 that the danger of irreparable loss cannot be "both great and immediate."

Further, because Paducah, pursuant to its municipal powers, has adopted the public nuisance approach; i.e., declared

the unlawful use to be a "per se" moral public nuisance, the question as to whether an exception exists under the test in Watson v. Buck, supra, must also be examined in the light of Huffman v. Pursue Ltd., supra, which considered the abstention issue in relation to an Ohio public nuisance abatement statute.

I(B) Under the General Principles Expressed In Huffman v. Pursue Ltd. And Middlesex County Ethics Committee v. Garden State Bar Assn. The Federal Court Must Abstain If An Important State Interest Is Involved And If The Statute Is Susceptible Of A Constitutional Construction In The State Court. It May Only "Assume Jurisdiction" Where The Challenged Statute Is "Flagrantly And Patently Violative Of Express Constitutional Prohibitions In Every Clause, Sentence And Paragraph And In Whatever Manner And Against Whomever An Effort Might Be Made To Apply It."

Huffman v. Pursue Ltd., 420 U.S. 592 (1975), considered the same "important state interest" that is involved herein. Huffman, however, was not ordered dismissed, but was remanded to the U.S.

District Court to determine whether the court could "assume jurisdiction"; that is at page 497:

> "whether . . . the District Court may assume jurisdiction under an exception to the (Younger) policy against federal judicial interference with state court proceedings of this kind." (our emphasis).

During the 1976 October Term, however, Huffman v. Pursue Ltd., supra, was further applied by this Court in other civil cases: Juidice v. Vail, 430 U.S. 327 (Mar. 22, 1977) and Trainor v. Hernandez, 431 U.S. 434 (May 31, 1977) and distinguished in Ohio Bureau of Employment Services v. Hodory, 431 U.S. 471 (1977). In his dissent in Juidice Justice Stewart noted a significant difference between Pullman abstention and Younger-Huffman abstention, at page 348:

> ". . . Both types of 'abstention' of course, serve the common goal of judicial restraint as a means of avoiding undue federal interference with state goals and

> functions. But there is a significant difference in result between the two. Under Pullman abstention the federal court may retain jurisdiction pending state-court interpretation of an ambiguous statute, while under Younger it may not." (our emphasis).

See also Trainor v. Hernandez,[5/] 431 U.S. 434, 445 (May 31, 1977) and Moore v. Sims, 442 U.S. 415, 430 (June 11, 1979), citing the Trainor v. Hernandez text noted above, in holding that the principles of Younger-Huffman, acted as a bar.

While the language of this Court in the above cases does not specifically hold that federal "jurisdiction" is in question, due to the interaction of 10th and 11th Amendment principles; if that were not at the very core of the problem, what would be the reason for distinguishing between Pullman abstention and

5/ In Trainor v. Hernandez, supra, the Court held that where Huffman v. Pursue Ltd. applies, pendency of the state court action called for dismissal of the complaint.

Younger- Huffman abstention? See, also, Ohio Civil Rights Commission et al., v. Dayton Christian Schools, Inc., et al., 476 U.S. ___ (June 27, 1986).

That a federal court lacks "jurisdiction" in matters involving state sovereignty, where the trial facts show that the constitutional claim can be raised and fully litigated in a civil action in the state court, finds support in the rationale expressed in Allen v. McCurry, 449 U.S. 90 (Dec. 9, 1980). In Allen et al. v. McCurry, supra, a majority of this Court had occasion to reflect upon the "legislative intent" which authorized federal jurisdiction in Civil Rights cases, under the authority of 42 U.S.C. Section 1983. In that decision, the majority made it clear that, except where the claim was made that a state statute was totally

unconstitutional on its face, it was not intended by Congress that the federal courts should have jurisdiction over a 42 U.S.C. Section 1983 federal cause of action where the state courts were available, as here, to allow full litigation of the constitutional claim. See Allen et al. v. McCurry, supra, at page 100:

> ". . . To the extent that it did intend to change the balance of power over federal questions between the state and federal courts, the 42d Congress was acting in a way thoroughly consistent with the doctrines of preclusion. In reviewing the legislative history of section 1983 in Monroe v. Pape, supra, the Court inferred that Congress had intended a federal remedy in three circumstances: where state substantive law was facially unconstitutional, where state procedural law was inadequate to allow full litigation of a constitutional claim, and where state procedural law, though adequate in theory, was inadequate in practice. 365 U.S. at 173-174. In short, the federal courts could step in where the state courts were unable or unwilling to protect federal rights. Id., at 176." (our emphasis).

Under Allen et al. v. McCurry, supra, neither Investment Entertainment, Inc.

nor Beltline News and Arcade Club, can claim that every litigant asserting a 42 U.S.C. Section 1983 federal right is entitled to one unencumbered opportunity to litigate the federal right in a federal district court. See Allen, et al. v. McCurry, 449 U.S. 90 at 103 and 105. In remanding Huffman to determine whether the District Court "may assume jurisdiction, " this Court defined the "jurisdictional" boundary line of that Younger "exception" at page 496 as:

> "Younger, and its civil counterpart which we apply today, do, of course, allow intervention in those cases where the District Court properly finds that the state proceeding is motivated by a desire to harass or is conducted in bad faith or where the challenged statute is 'flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it.' As we have noted, the District Court in this case did not rule on the Younger issue, and thus apparently has not considered whether its intervention was justified by one of these nar-

> row exceptions. . . ." (our emphasis).

The above rule of law, first voiced in Buck v. Watson, 313 U.S. at 401-402 and cited with approval in Younger v. Harris, 401 U.S. 37 at 53-54 (1971) and in Huffman v. Pursue Ltd., at p. 60, fn. 14, was correctly expressed by the United States District Court, M.D. Florida, Tampa Division in Stecher v. Askew, 432 F.Supp. 997 at 999 (1977):

> "While, as a general rule, a State Supreme Court may construe a statute which appears unconstitutional on its face in such a way as to render its application consitutional, see e.g., Wainwright v. Stone, 414 U.S. 21 (94 S.Ct. 190, 38 L.Ed.2d 179) (1973), there may be cases in which such a construction, even though attempted, may be impossible. Under the facts alleged in the complaint, the plaintiff has standing to assert that this statute presents such a situation. The plaintiff has standing as to this issue: to wit, whether the statute is unconstitutional on its face and could not be rendered constitutional by any decision of the Florida Supreme Court." (our emphasis).

In seeking intervention by the federal

court, the federal plaintiffs must successfully demonstrate that no further interpretation could bring City of Paducah Ordinance 83-6-2388 under question within the confines of the protections insured by the Constitution. If there is any saving interpretation which the state court could make, plaintiffs must demonstrate that the state courts will not so construe it.

In Middlesex County Ethics Committee, etc. v. Garden State Bar Assn., et al., 457 U.S. 423 (June 21, 1982), disciplinary proceedings were instituted by the local committee of the New Juersey disciplinary system against an attorney based upon an allegation of unethical conduct. Upon filing of a formal statement of charges, the respondent refused to answer, but instead filed suit in the United States District Court contending that the disciplinary rules violated his First Amendment right of

free speech. The District Court granted the Bar Association's Motion to Dismiss based on Younger v. Harris, 401 U.S. 37 (1971), but the Court of Appeals reversed. On appeal, the majority of this Court held that abstention was mandated, under the general principles previously expressed by this Court, "when important state interests are involved." See Middlesex County Ethics Committee, supra, at pages 432-435, which enunciates a test for Federal Court abstention in criminal and non-criminal proceedings involving "important state interests," which controlled the discretion of the Sixth Circuit below. The record herein demonstrates that the Middlesex County Ethics Committee test has been satisfied and abstention is mandated. The federal court proceedings implicated an "important state interest" (obscenity legislation). U.S. v. 12-200 Foot Reels,

413 U.S. 123 at 130, fn. 7:

> "We further note that . . . we must leave to state courts the construction of state legislation. . . ." (our emphasis).

See also, Paris Adult Theatre v. Slaton, 413 U.S. 49 at 57:

> ". . . we hold that there are legitimate state interests at stake in stemming the tide of commercialized obscenity. . . .";

and at page 59:

> "there is a 'right of the states to maintain a decent society. . . ."

"the salient fact is whether federal-court interference would unduly interfere with the legitimate activities of the state." See Middlesex County at page 433 footnote 12. The same constitutional challenges could have made in the state court. It was a usurpation of jurisdiction, for the Sixth Circuit to fail to abstain from the exercise of jurisdiction in this matter, in light of Paducah's refusal to waive the attribute of state sovereignty.

I(C) Paducah Has Not Waived Its Defense of Abstention. The Federal Court Must Return the Paducah Ordinance to the State System for an Authoritative Construction by the State Court.

In his concurring opinion, Justice Wellford thought that "abstention" was appropriate, but concluded that the issue had been waived, in reliance on Ohio Bureau of Employment Services v. Hodory, 431 U.S. 471 (1977). Paducah submits that Justice Wellford's reliance on Hodory for "waiver" of abstention is misplaced. Here, unlike Hodory, there are "strong policies counseling against the exercise of such jurisdiction where particular kinds of state proceedings have already been commenced" and appellate review is being exercised in the context of the federal court's denial of Paducah's Summary Judgment Motion, in which "Younger-Huffman abstention was pleaded by the City as its fourth defense in its answer to the

federal complaint (See Appendix "G"). See Ohio Civil Rights Commission et al. v. Dayton Christian Schools, Inc., et al., 476 U.S. ___, 54 L.W. 4860 at 4862 (June 27, 1986), where the Commission had filed a Motion to Dismiss, based upon the abstention doctrine, and had also filed various documents defending its action on the merits. There, this Court held there was no waiver:

> "Having taken jurisdiction over the decision below, we now turn to whether the District Court should have exercised jurisdiction over the case itself. We conclude that the District Court should have abstained from adjudicating this case under Younger v. Harris, 401 U.S. 37 (1971), and later cases. The Commission urged such abstention in the District Court, and on oral argument here. Tr. of Oral Arg., 7-8. Dayton has filed a post argument brief urging that the Commission has waived any claim to abstention because it had stipulated in the District Court that the Court had jurisdiction of the action. We think, however, that this argument misconceives the nature of Younger abstention. It does not arise from lack of jurisdiction in the District Court, but from strong policies counseling

> against the exercise of such jurisdiction where particular kinds of state proceedings have already been commenced. A state may of course voluntarily submit to federal jurisdiction even though it might have had tenable claim for abstention. See Brown v. Hotel Employees, 468 U.S. 491, 500, n. 9 (1984); Ohio Bureau of Employment Services v. Hodory, 431 U.S. 471, 479-480 (1977); Sosna v. Iowa, 419 U.S. 393, 396-397, n. 3 (1975). But in each of these cases, the State expressly urged this Court or the District Court to proceed to an adjudication of the constitutional merits. We think there was no similar consent or waiver here, and we therefore address the issue of whether the District Court should have abstained from deciding the case." (our emphasis).

Here, Paducah did not "expressly urge" the District Court or the Court of Appeal below to proceed to an adjudication of the constitutional merits. On the contrary, Paducah asked the Court to grant Summary Judgment and to defer to the state court lawsuits, which had been interfered with by the filing of the Civil Rights Action, and whose jurisdiction had been terminated by the removal action.

There are a number of practical

reasons why abstention should be mandated in this case:

(1) A Federal Court Lacks Jurisdiction to Authoritatively Construe State Legislation.

A federal court lacks jurisdiction to authoritatively construe state legislation involving the "important state interest" of obscenity constraints, see U.S. v. Thirty-Seven Photographs, 402 U.S. 363 (1971), a task which is routinely performed by state courts.

Further, were the Kentucky State Supreme Court to say that "black" is "white", or that the Paducah Ordinance has an entirely different meaning than that ascribed to it by the Sixth Circuit, the federal system on an appeal from that judgment must accept that interpretation Kingsley Pictures Corp. v. Regents, 360 U.S. 684, 688 (1959).

(2) A State Court Approaches the Task of Construing a City Ordinance from an Entirely Different Perspective.

There is a marked difference in the way in which the state and federal courts approach the constitutional issue regarding state legislation. Because of the doctrine of separation of powers in State Constitutions, the rule has evolved that state courts are obliged to render a construction of state legislation which will arrive at a constitutional result. See People ex rel. Busch v. Projection Room Theater, 17 Cal.3d 55 where the California Supreme Court noted, at page 60:

> "We are obliged to construe and interpret legislation in a manner which will uphold its validity. (Citations). Thus, the courts have held that provision for a prior adversary hearing may be implied by law in otherwise silent statutory provisions."

and compare, U.S. v. 37 Photographs, supra.

Federal courts do not bear the same relationship to state legislatures; accordingly, the end result is certain to differ.

(3) The Question As To Whether A City Ordinance is "Severable" Is More Properly A Matter For The State Court.

The question as to whether defective federal and state legislation may be "saved" by statutory construction or by severance of the defective portion presents important public policy matters for both federal and state governments. See Tilton v. Richardson, 403 U.S. 672 at 684, where Chief Justice Burger noted:

> "The cardinal principal of statutory construction is to save and not destroy."

The question as to whether a City Ordinance is severable is more properly a matter for the State Court. See Watson v. Buck, supra. In a recent statement confirming the importance of the "statutory construction" factor and the right of state court to interpret city ordinances, this Court in Metromedia, Inc. v. San Diego, 453 U.S. 490 (1981) (involving a direct appeal of a city ordinance after a

state court decision by the California Supreme Court upholding the ordinance on its face), remanded the case back to the California Supreme Court for <u>further</u> statutory construction by the state court, <u>notwithstanding it held the ordinance to be unconstitutional on its face</u>. See, in particular, Justice White's opinion announcing the judgment of the Court at page 521, fn. 26, wherein he addresses the issue of severability and the responsibility and right of state courts in that regard.

The dilemma is how this procedural step is to be accomplished when, as here, the federal court "interferes" with the functioning of the state court system.

(4) Federal Interference Promotes Judicial Inefficiency.

The judicial <u>inefficiency</u> of continuing to permit the federal system to entertain jurisdiction of civil rights cases of this sort and render judgments

thereon which, in the final analysis under Dombrowski, are and must be inconclusive, when the state court system is ready, willing and able to consider the identical issues and render a judgment thereon, which will be binding and conclusive, is apparent from the record herein.

Federal interference has increased the period of uncertainty and multiplied the costs of litigation. If the ordinance is to be pursued further, Paducah must start anew without the benefit of a definitive state court decision, and burdened with the conflicting views of the federal judges which will become a part of the law of this case.

U.S. District Judge Johnstone ruled that the ordinance's use of undefined terms such as "regular course of business", "repeatedly", and "principal part", was a defect, and would give business operators no notice of what conduct the

ordinance reached; on the other hand, Justice Wellford, in his concurring opinion, took note of the majority's failure to discuss this aspect and stated in an "aside" that:

> "I have no problem, as did the District Court, with the words 'regular course of business' and 'repeatedly' as used in the ordinance in question. I do not find them 'vague' or overbroad, examined in context with their use in the ordinance. . . ."

Justice Wellford disagreed with Justices Merritt and Celebrezze's assessment that the license revocation provision was entirely inadequate. In his concurring opinion, Justice Wellford stated:

> "I do not harbor the serious reservations of Judge Merritt that obscenity ordinances may not, under any circumstances, validly revoke a business license of one dealing in obscenity, properly defined, in a particular location. A permanent revocation of license may be too broad a sanction in the situation before us. . . ."

Justices Merritt and Celebrezze felt that the license revocation required severence -- but failed to address the issue.

II

PADUCAH ORDINANCE 83-6-2388 IS NOT "UNCONSTITUTIONAL ON ITS FACE", IN THE SENSE THAT TERM IS USED IN WATSON v. BUCK AND HUFFMAN v. PURSUE, LTD.

Paducah submits that Ordinance 83-6-2388 is not unconstitutional on its face in the "sense" of Watson v. Buck and Huffman v. Pursue, Ltd.

The City of Paducah possesses the historic common law power of cities to declare a "manufactory of obscene materials" (i.e., a place of business in which obscene publications constitute all of the stock in trade, or a principle part thereof) to be a moral public nuisance per se. Further, an ordinance which revokes all licenses and permits of such a place of business where no criminal proceedings may be brought for transacting business without a license unless and until the Public Nuisance per se has been

established at a trial on the merits, and the trial judge has equitable discretion to confirm or deny the license revocation, does not constitute an unlawful "prior restraint". It represents a proper implementation of the governmental power of a city to license lawful businesses, and to revoke licenses of unlawful businesses.

II(A) Paducah's Motions For Summary Judgment Should Have Been Sustained. The City Has A Historic Right To Declare A Place To Be A Public Nuisance And To Revoke Business Licenses Of Unlawful Activities. That Sovereign Right Of Government Is Unrelated To Expressive Activity And May Not Be Enjoined Or Interfered With By The Federal Courts. U.S. v. O'Brien Is Inapplicable.

As explained above, 10 - 15, Paducah Ordinance 83-6-2388 is not directed at "obscene" subject matter as "subject matter"; rather it is directed entirely at a "place" which is a "manufactory" of obscene subject matter. The right of a City

to abate "places" and unlawful businesses which are per se moral public nuisnaces is historic. Contrary to the rulings of the United States District Court and the Court of Appeals, Sixth Circuit, which enjoined that right and the use of that power, the right of the City of Paducah to legislate on the subject matter of immoral public places is unequivocal, in that the right to abate a "place" as distinguished from a "writing", etc., is unrelated to expressive activity. The test for permissible governmental regulation, expressed in United States v. O'Brien, 391 U.S. 367 (1968) would, therefore, seem to be inapplicable for the reasons given in Arcara, District Attorney of Erie County v. Cloud Books, Inc., ___ U.S. ___, 54 Law Weekly 5060 at 5062, quoted above at page 8 supra.

More than a century ago, this Court pointed out in James Phalen v.

Commonwealth of Virginia, 12 L.Ed. 1030, 1033 (1850);

> "The suppression of nuisances injurious to public health or morality is among the most important duties of government...it is a principle of the common law, that the king cannot sanction a nuisance."

See, also, Mugler v. Kansas, 123 U.S. 205 (1887). Even more anciently, our Anglo-Saxon legal system has described its own function as: "The courts are the guardians of the public morals." Rex v. Curl, 2 Strange 789 (1727); Sir Charles Sedley's case 1 SID 168. See, also, Newark, The Boundaries of Nuisance, 1949, 65 L.Q.Rev. 480, 482; Stephen, General View of the Criminal Law of England, 1890 at 105; Joyce, Law of Nuisances, Section 345 at page 498; H.G. Wood, The Law of Nuisances, Section 57 at page 77 and Section 65 at page 85; Sections 23 and 24 at pages 45-46; Section 743 at page 972; 66 Corpus Juris Secundum, Section 3, "Nuisances Per

Se and Per Accidens" at page 733 et seq.; Harris v. U.S., 315 A.2d 569 at 572, footnote 9 (1974); Bader v. Iowa Metropolitan Sewer Service Company, 178 N.W.2d 305, 306-307, Accord, Robichauxn v. Huppenbauer, 258 La. 139, 245 So.2d 385, 389 (1971); 58 Am.Jur.2d, Nuisances, Section 12 (1971); Art Theater Guild Inc., v. Ohio ex rel. Ewing, 421 U.S. 923, 44 L.Ed.2d 82, 95 S.Ct. 1649 (April 21, 1975). Appeal dismissed for want of a substantial federal question; Huffman v. Pursue Ltd., 420 U.S. 592 at 612, 43 L.Ed.2d 482 at 497, 95 S.Ct. 1200 at footnote 23.

Further, to say that a license to do business has been revoked because a public nuisance presently exists at that place, where such revocation may not be the basis of criminal sanction until the revocation has been approved by a court in an adversary hearing, and where the court

has an "equitable discretion" to confirm or deny such revocation, does not invite the type of criticism which appears in Universal Amusement Co. v. Vance, 587 F.2d 159 (5th Cir. 1978) aff'd in 445 U.S. 308 (1980). See, generally, McQuillan, Municipal Corporations, Section 26.80 at page 191 et seq. and §26.93 at page 216 et seq. Since a trial court has the power to make a determination that a public nuisance, in fact, exists, it also must have the power to pass upon the correctness of the revocation of license which, by ordinance, automatically attends such finding of fact, and to exercise its inherent equitable powers in relation to the licensing power. See 106 Forsyth Corporation v. Bishop, 362 F.Supp. 1389 (February 2, 1972), affirmed in 106 Forsyth Corporation v. Bishop, 362 F.Supp. 1389 (Feb. 2, 1972), affirmed in 106 Forsyth Corporation v. Bishop, 482 F.2d 280 (July 19, 1973),

petition for certiorari denied in 106 Forsyth Corporation dba Paris Theater v. Bishop et al., 422 U.S. 1044, 45 L.Ed.2d 696, 95 S.Ct. 2660 (June 23, 1975); West Gallery Corporation v. Salt Lake City Board of Commisioners, 586, P.2d 429 (October 16, 1978); Ogden City v. Eagle Books Inc., dba Adult Book Store, 586 P.2d 436 (October 16, 1978).

II(B) The Civil Rights Actions Also Fail To State Sufficient Facts To Constitute A Claim Upon Which Federal Relief Can Be Based. The Defendant In The State Law Enforcement Lawsuit Must Plead And Prove The Jurisdictional Exception For Federal Jurisdiction.

The complaint and pleadings on file herein demonstrate that Plaintiffs have not stated a civil rights claim upon which federal relief can be based. See Martinez v. California, 444 U.S. 277 (1980).

Under the rationale expressed in Allen v. McCurry, 449 U.S. 90 (1980), and Parratt v. Taylor, 451 U.S. 527 (1981), Congress intended to establish federal

jurisdiction under 42 U.S.C. Section 1983 where one of the following three circumstances is shown to exist:

(1) The State substantive law is facially and totally unconstitutional;

(2) The State procedural law is inadequate to allow full litigation of a constitutional claim; or

(3) The State procedural law, though adequate in theory is inadequate in practice.

In this case, none of the foregoing circumstances apply. Paducah Ordinance 83-6-2388 is not facially unconstitutional, and the procedural law of the State of Kentucky is entirely adequate to allow full litigation of all constitutional claims.

As noted by United States District Judge Young's analysis of Parratt, supra, in Juncker v. Tinney III, 549 F.Supp. 574, the jurisdictional question may not be one of "abstention" and whether the

plaintiff has exhausted his state judicial remedies, but rather whether the plaintiff has stated a claim upon which relief an be based, at page 578:

> "The argument for applying Parratt to liberty and life interest (and thus for sending many purported section 1983 cases to state court) is based not upon principles of comity but upon the language of the Fourteenth Amendment and upon the concept that in certain situations a complaint fails to state a claim under the Fourteenth Amendment because the plaintiff has not been deprived of a constitutional right without due process of law. Proof of this difference lies in the different results. Under an exhaustion requirement, a plaintiff may sue in federal court after he has exhausted his state remedies. Under the Parratt analysis, if a plaintiff fails to state a claim under section 1983, he has no cause of action in federal court, and nay sue only in state court." (our emphasis).

In Vickory v. Walton, 721 F.2d 1062 (CA 6th, Nov. 30, 1983), petition for a writ of certiorari denied by this Court, the Court undertook an analysis of Parratt, supra, and determined that 42 U.S.C. Section 1983 was not meant to supply an

exclusive federal remedy for every alleged wrong. The gist of the cause of action was a deprivation of property interest "without due process of law." Under this analysis, the court held the plaintiff must plead and prove that the state remedies for redressing the wrong were inadequate and that, in a procedural due process case under 42 U.S.C. Section 1983 plaintiff must attack the state corrective procedure as well as the substantive wrong. In Vickory v. Walton, supra, the Sixth Circuit held that the plaintiff had neither alleged nor shown any significant deficiency of the state remedy.

Applying Vickory v. Walton, it is clear that the federal plaintiffs have not alleged a cause of action under 42 U.S.C. Section 1983. The City of Paducah was entitled to a dismissal under the first defense in its Answer for failure to state a claim upon which federal relief

could be granted. Martinez v. California, 444 U.S. 277 at 285 (1980).

CONCLUSION

Under Watson v. Buck, 313 U.S. 387 (1941) the only question before the U.S. District Court on the issue of "abstention" was whether newly enacted Paducah Ordinance 83-6-2388 was unconstitutional on its face; i.e., "flagrantly and patently violative of express constitutional prohibition in every clause, sentence, and paragraph, and in whatsoever manner and against whomever an effort might be made to apply it."

In answering the above question, the trial court was required to weigh in the balance the historic powers of a City: (1) to license lawful activities, and (2) to abate places which are per se moral public nuisances; which are central to a resolution of Questions 2A and 2B to this Petition, namely;

2A Whether the City of Paducah, under its nuisance abatement powers, has the power to enact a procedural public nuisance ordinance which declares a place of business in which obscene publications constitute either: (1) all of the stock in trade, or (2) a principle part of the stock in trade, to be a public nuisance per se; and

2B Whether under such a procedural public nuisance ordinance, the City may act to revoke all licenses and permits of such business, where: (1) no criminal proceedings may be brought for transacting business without a license unless and until the existence of such public nuisance has been established at trial on the merits, and the license revocation confirmed by a decree of the McCracken Circuit Court in judicial proceedings brought by the City for the purpose, within five (5) days after passage of said resolution; and where: (2) the trial judge has equitable discretion to confirm or deny such license revocation?

If the above questions of law are answered in the negative, then the federal court should hold the ordinance unconstitutional on its face, and abstention was not required under Watson v. Buck. Conversely, if the above questions of law must be answered in the affirmative, as Paducah

contends herein, then the trial court should have held: (1) that the ordinance is not facially unconstitutional, in that a City does have the power: (1) to declare a place of business which is a "manufactory of obscene matter" to be a per se public nuisance, and (2) to provide for license revocation after a trial on the merits and confirmation by a trial court which possesses equitable jurisdiction to confirm or deny the license revocation, and, thereafter should have abstained, and remanded the cases of the state court for an interpretation and construction as to the language employed in the ordinance. See Metromedia, supra.

The motion of the City of Paducah for Summary Judgment under its first, fourth and fifth defenses should have been sustained by the trial court and the State case remanded to the State Court for Trial on the merits.

CERTIFICATE OF SERVICE

I, hereby certify that on this 23rd. day of August , 1986, the original and 40 copies of the within Petition for Writ of Certiorari were deposited in the United States Post Office in VAN Nuys, CALIFORNIA with first-class postage prepaid, and properly addressed to the Clerk of the United States Supreme Court.

I further certify that three (3) copies were also mailed, postage prepaid, to the below listed parties to the proceedings and that all parties required to be served have been served.

Mr. Joseph S. Freeland
Freeland, Glanville and Megibow
910 Citizens Bank Building
Paducah, Kentucky 42001
(Attorney for Respondents)

Attorney for
Petitioners.

APPENDIX "A"

Opinion of the United States Court of Appeals for the Sixth Circuit in City of Paducah v. Investment Entertainment, Inc., et al., and Investment Entertainment, Inc., (No. 85-5092) Beltline News and Arcade Club, (No. 85-5903) v. City of Paducah et al., Nos. 85-5092, 85-5093 decided May 28, 1986.

(Reference: Petition for Writ of Certiorari at page 2, line 15; page 20, line 19; page 21, line 16).

....A-1 thru A-40

Nos. 85-5092, 85-5093

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

CITY OF PADUCAH, Plaintiff-Appellant, v. INVESTMENT ENTERTAINMENT, INC., et al., Defendants-Appellees.	)	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY
INVESTMENT ENTERTAINMENT, INC., (NO. 85-5092). BELTLINE NEWS AND ARCADE CLUB, (NO. 85-5093). Plaintiffs-Appellees. v. CITY OF PADUCAH, et al., Defendants-Appellants.	)	

Decided and Filed May 28, 1986

Before: MERRITT and WELLFORD, Circuit Judges; and CELEBREZZE, Senior Circuit Judge.

MERRITT, Circuit Judge, delivered the opinion of the court in which CELEBREZZE, Senior Circuit Judge, joined. WELLFORD, Circuit Judge (pp. 16-18), delivered a separate concurring opinion.

MERRITT, Circuit Judge. The City of Paducah, Kentucky, appeals the judgment of District Judge Johnstone that Paducah's obscenity abatement ordinance, on its face, establishes a prior restraint of protected speech and thereby unconstitutionally infringes the first amendment rights of plaintiffs Investment Entertainment, Inc. and Beltline News and Arcade Club, sellers of books, magazines, and video tapes. We agree that the ordinance's provision requiring the revocation of the occupational licenses of booksellers and move theatres dealing in obscenity renders the ordinance invalid.

I.

On June 14, 1983, the City of Paducah enacted an ordinance to control obscene material as defined in Miller v. California, 413 U.S. 15 (1973). Relying on the city's power to declare and abate public nuisances, the ordinance defines the following as "public nuisances per se" in Paducah: (1) any place where obscene films are publicly exhibited or possessed for exhibition in the regular course of business; (2) any obscene film so exhibited or possessed; (3) any place of business, or portion thereof, where obscene publications constitute a principal part of the stock in trade of the business; and (4) any obscene publication possessed at such a place. The ordinance also defines as "a public nuisance per accidens" all money or other consideration received for the exhibition or sale of such obscene films

or publications after the manager of the business receives certified notice of the initiation of proceedings under the ordinance.

The key contested provision of the ordinance states that the Paducah Board of Commissioners, upon a specific finding that a public nuisance exists, shall by resolution order a revocation of all licenses and permits that have been issued to the business maintaining the nuisance. This license revocation is subject to judicial confirmation.

The Board must then order counsel for the city to bring a civil action against the public nuisance. In addition to license revocation, the ordinance contemplates that the action will seek an order enjoining all persons maintaining the nuisance from possessing or marketing the obscene films or publications at any time in the future,

an accounting of all money received in the obscenity business, forfeiture of the obscene materials and the money, and judgment for the city for all costs expended in abating the nuisance. The ordinance provides that the "cost of abatement," which is defined to include investigative costs, court costs, reasonable attorney fees, and printing costs for any trial and appeal, is to be a special assessment against the parcel of land upon which the public nuisance is maintained, but only against the interests of the individuals responsible for maintaining the nuisance. This special assessment is to be collected and enforced by the same means as used for ordinary local property taxes.

In June and July of 1983, Paducah police officers purchased obscene magazines and video tapes from businesses operated in Paducah by

Investment and Beltline. Counsel for the city wrote a letter to both informing them of the ordinance and of the material purchased by the police officers. The letter gave them notice that public hearings would be held. In August 1983, after a hearing, the Board adopted a resolution finding the material purchased from Investment to be obscene and declaring the business from which the material was purchased to be a public nuisance. In September 1983, the Board adopted a similar resolution concerning Beltline. Thereafter, counsel for the city initiated civil actions in Kentucky state court seeking abatement of the nuisances as provided by the ordinance.

Investment and Beltline brought separate suits in the United States District Court for the Western District of Kentucky, both under 42 U.S.C. § 1983

(1982), seeking to have the ordinance declared constitutionally invalid and to have the city enjoined from enforcing the ordinance. Alleging diversity of citizenship, Investment removed the state court enforcement action pending against it to federal district court. Beltline also attempted to remove the enforcement action directed against it to federal court, but removal was denied because there was no diversity of citizenship. The District Court then consolidated all three actions. The parties have raised no issue concerning abstention in the District Court or this Court.

Neither Investment nor Beltline challenged the ordinance's definition of obscenity, and both admit that the material seized is obscene within the Miller v. California definition. The District Court granted their motions for

summary judgment. It held that because the ordinance's license revocation procedure could result in closing down an entire place of business even though not all the material was obscene, the abatement procedure amounted to a prior restraint of both protected speech and unprotected speech. Judge Johnstone gave this example: Under the ordinance, a movie theatre could be closed for repeatedly showing an obscene film on weekends even though the theatre showed "The Ten Commandments," "Snow White," and "Gone With the Wind" on week days. The District Court also held that the ordinance's abatement procedure unconstitutionally encouraged businesses to engage in self-censorship because the threat of having an entire place of business "abated" would induce business operators to avoid questionable, but still protected, films and publications.

The District Court ruled that this self-censorship arises from the ordinance's use of undefined terms such as "regular course of business," "repeatedly," and "principal part." The court held that in this respect the ordinance was vague and would give business operators no notice of what conduct the ordinance reached.

II.

The ordinance requires the revocation of the business licenses of distributors and exhibitors of obscene material. It therefore restrains future speech of the booksellers and theaters whose licenses are revoked--both obscene and decorous speech. The main issue presented is whether Paducah may use license revocation as a tool to control obscenity.

The problem of using licensing to control distribution of printed

expression by booksellers and publishers has a long history. Milton's Areopagitica remains the classic argument against the licensing of speech. Writing in 1644, just after the revolution, in response to a parliamentary law reestablishing the use of licensing to control books, Milton takes as his "task...to show that no...well instituted state, if they valued books at all, did ever use" "this authentic Spanish policy of licensing books." He argues instead that "the timeliest and most effectual remedy" is subsequent evaluation and seizure if necessary. Among his many arguments, Milton advances the danger to truth and beauty because they are difficult to distinguish from falsity and ugliness (however "much we thus expel of sin, so much we expel of virtue, for the matter of them both is the same") and the

problem of the "quality which ought to be in every licenser" ("he who is made judge to sit upon the birth and death of books...had need to be a man above the common measure, both studious, learned, and judicious." Yet, "there cannot be a more tedious and unchosen journeywork...than to be made the perpetual reader of unchosen books and pamphlets"). Licensing speech discourages new ideas ("I found and visited the famous Galileo, grown old, a prisoner to the Inquisition, for thinking in astronomy otherwise than the Franciscan and Dominican licensers thought"); undermines expression as a value in itself ("[g]ive me the liberty to know, to utter, and to argue freely according to conscience, above all liberties"); and raises the prospect of manipulation and misinformation when we "pretend to bind books to their good

behavior" ("for what magistrate may not be misinformed, and much the sooner, if liberty of printing be reduced into the power of a few?").

By the late Eighteenth Century, Milton's view against licensing had become the English common law rule against prior restraint, as reflected in Blackstone's Commentaries:

> The liberty of the press is indeed essential to the nature of a free state: but this consists in laying no previous restraints upon publications....To subject the press to the restrictive power of a licenser, as was formerly done, both before and since the revolution, is to subject all freedom of sentiment to the prejudices of one man, and make him the arbitrary and infallible judge of all controverted points of learning, religion, and government.[1]

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[1] 4 W. Blackstone, Commentaries *151-52 (emphasis in original). Blackstone described the history of printer licensing in England:

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The British common law against licensing publishers and booksellers was part of the foundation for the first amendment's guarantee of freedom of the press. See Z. Chafee, Free Speech in the United States 10-12 (1942) (arguing that the Blackstonian view of freedom of the press--freedom from prior restraint--was part, but only part, of the freedom that the first amendment had come to guarantee).

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The art of printing, soon after it's introduction, was looked upon (as well in England as in other countries) as merely a matter of state, and subject to the coercion of the crown. It was therefore regulated with us by the king's proclamations, prohibitions, charters of privilege and of licence, and finally by the decrees of the court of starchamber; which limited the number of printers, and of presses which each should employ, and prohibited new publications unless previously approved by proper licensers. On the demolition of this odious jurisdiction in 1641, the long parliament of Charles I, after

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III.

Modern first amendment jurisprudence has followed Milton and Blackstone on prior restraint. As the District Court noted, that law has dealt with the licensing problem by

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their rupture with that prince, assumed the same powers as the starchamber exercised with respect to the licensing of books; and in 1643, 1647, 1649, and 1652, (Scobell. i. 44, 134, ii. 88, 230.) issued their ordinances for that purpose, founded principally on the starchamber decree of 1637. In 1662 was passed the statute 13 & 14 Car. II. c. 33. which (with some few alterations) was copied from the parliamentary ordinances. This act expired in 1679, but was revived by statute I. Jac. II. c. 17, and continued till 1692. It was then continued for two years longer by statute 4 W. & M. c. 24, but, though frequent attempts were made by the government to revive it, in the subsequent part of that reign, (Com. Journ. 11 Feb. 1694, 26 Nov. 1695. 22 Oct. 1696. 9 Feb. 1697, 31 Jan. 1698.) yet the parliament resisted it so strongly, that it finally expired, and the press became properly free, in 1694; and has ever since so continued.

Id. at *152 n.2.

focusing on whether the use of licensing constitutes a prior restraint of protected expression. The major case on prior restraint is Near v. Minnesota, 283 U.S. 697 (1931). In Near the Court invalidated, as a prior restraint, an injunction entered against a newspaper under a Minnesota statute providing that any newspaper publishing malicious, scandalous, or defamatory material is a nuisance and can be permanently enjoined. Chief Justice Hughes, quoting Blackstone, pointed out that part of the first amendment grew out of the struggle in Britain against the "legislative power of the licenser" of the press. Id. at 713-14. The Court held that if "the object of the statute is not punishment, in the ordinary sense, but suppression of the offending newspaper or periodical" in the future, and "the statute not only operates to suppress

the offending newspaper or periodical but to put the publisher under an effective censorship." 283 U.S. at 709-12, then the statute constitutes a prior restraint.

The City of Paducah's argument that its licensing ordinance is not a prior restraint is similar to Justice Butler's argument for the four dissenters in Near, Paducah, one might argue, is only revoking a previously issued business license, and when the licenses are issued they are completely unrelated to the regulation of speech. Later revocation is for abuse of the occupational license.

Likewise, Justice Butler argued that prior restraint consists of licensing publishers and their books as an original matter, not of later revocation for abuse of the right. Later revocation "does not operate as a

previous restraint on publication within the proper meaning of that phrase" because it "is only in respect of continuing to do what has been duly adjudged to constitute a nuisance." Id. at 735 (emphasis in original). "It is fanciful to suggest similarity between...the decree...to prevent further publication of malicious, scandalous, and defamatory articles and the previous restraint upon the press by licensers as referred to by Blackstone...." Id. at 736 (emphasis in original). Chief Justice Hughes and the majority of the Court rejected this argument--"that the constitutional freedom from previous restraint is lost because charges are made of derelictions which constitute crimes"--dereliction because "[the argument] is inconsistent with the reason which underlies the privilege." Id. at 720-21.

Several federal and state courts have addressed the first amendment question presented by state laws and local ordinances that use the nuisance abatement power to control obscenity. Laws on this subject differ in approach. Some, as in the instant case, abate the nuisance by revoking the offending business' general business license. Others, the so-called "padlock" laws, call for a judicially ordered temporary or permanent injunction under which local authorities close the place of business and do not allow its owners to operate out of that location for the duration of the injunction.

We have found no precedent in which courts have upheld an obscenity law that provided for the revocation of obscenity dealers' business licenses. In at least three instances, federal courts have held local obscenity ordinances that use

the revocation of licenses and permits to be unconstitutional prior restraints of protected speech. Gayety Theatres, Inc. v. Miami, 719 F.2d 1550 (11th Cir. 1983); Entertainment Concepts, Inc. III v. Maciejewski, 631 F.2d 497 (7th Cir. 1980); cert. denied, 450 U.S. 919 (1981); Cornflower Entertainment, Inc. v. Salt Lake City Corp., 485 F.Supp. 777 (D. Utah 1980); see also Genusa v. City of Peoria, 619 F.2d 1203, 1213-15 (7th Cir. 1980) (requirement that adult bookstore license applicant submit to inspection of premises was held unconstitutional). But cf. Young v. American Mini Theatres, Inc., 427 U.S. 50, 62-63 (1976) (adult movie theatres may be licensed if licensing is necessary to valid zoning and locational requirements); Genusa, 619 F.2d at 1212-13 (same for adult bookstores).

The Supreme Court has not ruled directly on the licensing issue in an obscenity case.

The padlock cases are also pertinent, although not directly on point. The results in the padlock and other similar cases have varied. The Supreme Court has never ruled on the question of whether a padlock obscenity law is an unconstitutional prior restraint.[2] Because this is a license revocation ordinance case, we need not give an opinion on the padlock laws which are usually less intrusive than license revocation. But a review of a few of the cases is instructive.

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[2] See Avenue Book Store v. City of Tallmadge, 459 U.S. 997, 998 (1982) (White, J., dissenting to the Supreme Court's denial of certiorari, quoted infra note 3).

In Universal Amusement Co. v. Vance, 587 F.2d 159 (5th Cir. 1978), the Fifth Circuit held that a nuisance statute's provision for temporary closure of businesses distributing obscene material was an unconstitutional prior restraint of business operators' rights to engage in protected expression during the closure period. The Supreme Court affirmed at 445 U.S. 308 (1980), but, in affirming, the Court aimed its per curiam opinion at the fact that under the statute a prosecutor could obtain a temporary restraining order and preliminary injunction against showing certain named and unnamed films before judicial determination that the films were indeed obscene. 445 U.S. at 316 n. 14. The Court held that this procedure was an unconstitutional prior

restraint.[3] Several other courts have held padlock obscenity laws invalid. See Cornflower Entertainment, Inc. v. Salt Lake City Corp., 485 F.Supp. 777

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[3] See Justice White's dissent in which he argues that the Court misunderstood the statute's provision dealing with an injunction to be issued after judicial determination that the material involved was obscene. 445 U.S. at 320-25. See also the dissent to the Supreme Court's denial of certiorari in Avenue Book Store in which Justice White states:

> In Vance v. Universal Amusement Co., 445 U.S. 308 (1980), the Court upheld a finding that a Texas public nuisance statute authorized an unconstitutional "prior restraint for indefinite duration on the exhibition of motion pictures without a final judicial determination of obscenity and without any guarantee of prompt review of a preliminary finding of probable obscenity." Id. at 309. Fatal to that statute were particular procedural infirmities of the Texas nuisance scheme whereby the subject of an abatement order or injunction "would be subject to contempt proceedings even if the film [was] ultimately found to be nonobscene." Id. at 316.

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(D.Utah 1980); People ex rel. Busch v. Projection Room Theatre, 17 Cal.3d 42, 130 Cal.Rptr. 328, 550 P.2d 600, cert. denied sub nom., Van De Kamp v. Projection Room Theatre, 429 U.S. 922 (1976); State v. A Motion Picture Entitled "The Bet", 219 Kan. 64, 547 P.2d 760 (1976); see also Note, Pornography, Padlocks, and Prior Restraints: The Constitutional Limits of the Nuisance Power, 58 N.Y.U.L. Rev. 1478, 1489 (1983) ("courts generally have assumed that padlock orders are

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> The Court has never determined however, whether abatement orders, such as the one involved in the present case, will pass constitutional muster when they permanently enjoin the use of a business premises for the sale or display of obscene material, but do not subject the owner to contempt sanctions unless there has been a judicial determination of obscenity.

prior restraints without engaging in substantial analysis under prior restraint doctrine.").[4]

On the other hand, several state courts have held that padlock laws aimed at businesses involved in the sale or exhibition of obscene material are not prior restraints. In State ex rel. Kidwell v. U.S. Marketing, Inc., 102 Idaho 451, 631 P.2d 622 (1981), appeal dismissed sub nom., U.S. Marketing, Inc. v. Idaho, 455 U.S. 1009 (1982), the Idaho Supreme Court dealt with a state

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[4] Accord J.R. Distributors, Inc. v. Eikenberry, 725 F.2d 482 (9th Cir. 1984), rev'd on other grounds sub nom., Brockett v. Spokane Arcades, Inc., 105 S.Ct. 2794 (1985). In Eikenberry the Ninth Circuit stated as dictum (see 105 S.Ct. at 2797 n.5; 725 F.2d at 498 (Wallace, J., dissenting))that an obscenity abatement law's provision requiring forfeiture of profits derived from the sale of both obscene and nonobscene material unconstitutionally restricted free speech rights in the nonobscene material.

nuisance law providing that if a business is engaged in selling or exhibiting obscene material, the real property used in the business is forfeited for a period of one year. The defendant argued that this forced forfeiture constituted an unconstitutional prior restraint on business operators' first amendment rights to engage in protected, nonobscene expression. The court noted that under Roth v. United States, 354 U.S. 476 (1957), the state could punish purveyors of obscene material and that the state was not limited to criminal sanctions as a weapon against obscenity. Kingsley Books v. Brown, 354 U.S. 436, 441 (1957). The court held that the purpose of the nuisance law was to deter dealing in obscenity, and, in response to the prior restraint argument, it stated:

> By way of example, if a bookseller, having fallen behind on his property taxes, loses his bookstore at a tax sale, he will not be heard to complain that the state has imposed an unlawful prior restraint upon his bookselling activities. If that same bookseller is convicted of the crime of distributing obscene materials, he may be imprisoned, and yet he will not be heard to complain that his incarceration constitutes a prior restraint upon his ability to disseminate protected speech, even though it is quite clear that it has that effect.
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> * * *
>
> The one-year forfeiture provision of the Idaho moral nuisance statute avoids the particularly noxious specter of content control. Like a tax sale, the forfeiture is directed strictly at property, apart from the content of any expression contained therein. And like imprisonment for a criminal obscenity transgression, the forfeiture is intended to penalize past distributions of illegal and unprotected obscenity. The legislature could just as easily have imposed a fine or other property-related penalty. Instead, the legislature chose to punish the violator by temporarily depriving him of the property which was used in committing the violation.

631 P.2d at 627-28.

Under this line of analysis, similar to Justice Butler's argument in dissent in Near, if the nuisance abatement procedure is seen as a means of deterring or punishing purveyors of obscene material, preventing a business operator from selling or exhibiting any publications or films in the future is no more of a prior restraint than closing his business for drug or weapons violations would be. Along these lines see State ex rel. Calahan v. Diversified Theatrical Corp., 59 Mich.App. 223, 229 N.W.2d 389 (1975), rev'd on other grounds, 396 Mich. 244, 240 N.W.2d 460 (1976).

IV.

As noted by the Idaho Supreme Court in Kidwell, not all laws that have the effect of preventing a person from engaging in protected expression in the future are prior restraints as that term

has been developed. Assuming a valid statute, the state of Kentucky could incarcerate a person who is properly convicted of violating Kentucky's obscenity statute. See Ginzburg v. United States, 383 U.S. 463 (1966) (upholding conviction for violation of federal obscenity statute; defendant had been sentenced to serve five years) and Ky. Rev. Stat. § 531.020 (1985) (distributing two pieces of obscene matter is a class A misdemeanor in Kentucky, which may result in imposition of up to a one-year jail sentence). If a bookstore operator were convicted for selling obscene material in his store and were sentenced to serve time in the state prison, his ability to continue to personally sell nonobscene books in his store would be foreclosed for the duration of his incarceration. But it

is doubtful that he could make a valid argument that the state law under which he was incarcerated is a prior restraint of his right to engage in protected expression by selling nonobscene books.

Similarly, it is doubtful that he could make a valid argument that a nuisance abatement law applied to obscenity is an unconstitutional prior restraint if the law is narrowly structured as a deterrent or punishment of purveyors of obscenity. If, on the other hand, the abatement procedure focuses on regulating the future speech of a defendant who has been adjudged "guilty" of distributing obscene material, the law is tantamount to a licensing statute establishing a prior restraint of the defendant's first amendment right to engage in nonobscene expression. To use the language of Near

v. Minnesota, a nuisance abatement procedure applied to obscenity should be upheld if "[t]he object of the [procedure] is punishment, in the ordinary sense, [rather than] suppression of the offending [business]" and if the procedure does not "operat[e] to...put the publisher under an effective censorship." 283 U.S. at 709-12.

No doubt one of the purposes of Paducah's license revocation ordinance is to deter the sale and exhibition of obscene material. But the ordinance goes beyond this purpose as District Judge Johnstone found. The main thrust of the abatement procedure is the revocation of all licenses and permits under which the business in question operates. Even under the so-called padlock laws, a business operator remains free to engage in protected

expression in another location. Paducah's procedure of revoking business licenses is more restrictive in that it essentially prevents the offending business from engaging in future distribution of protected, nonobscene material anywhere within the City of Paducah. We therefore conclude that the ordinance's use of license revocation as a weapon against obscenity goes beyond merely deterring or punishing individuals who deal in obscene material. The ordinance's purpose, as evidenced by the license revocation provision, is to control future expression by businesses that have been subjected to the nuisance abatement procedure. The ordinance is a prior restraint of plaintiff's freedom of expression.

Of course, not all prior restraints of free speech are unconstitutional.

But none of the exceptions are present here. In order to be valid, a system imposing a temporary prior restraint must implement certain procedural safeguards required by Supreme Court precedent. These safeguards are drawn from Freedom v. Maryland, 380 U.S. 51 (1965), and more recently from Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 560 (1975), in which the Court stated:

> First, the burden of instituting judicial proceedings, and of proving that the material is unprotected, must rest on the censor. Second, any restraint prior to judicial review can be imposed only for a specified brief period and only for the purpose of preserving the status quo. Third, a prompt final judicial determination must be assured.

As to the obscene material whose sale or exhibition triggered the application of Paducah's ordinance, the

safeguards are adequate. Or, more accurately, there is no restraint at all before a judicial hearing is conducted, since the sale and exhibition of the material is not restrained until after a judicial determination that the material is indeed obscene.[5] As discussed above, however, the license revocation procedure would still operate as a prior restraint on plaintiffs' future distribution of nonobscene expression.

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[5] The parties have not argued the possibility that in an enforcement action Paducah might obtain, under Kentucky state court procedures, a temporary restraining order directed at allegedly obscene material before the material had been judicially adjudged obscene. We note that the majority of the Supreme Court spoke to such a procedure in Vance v. Universal Amusement, 445 U.S. 308 (1980), but that is not an issue here.

Neither the parties nor the District Court has addressed the possibility that the ordinance's unconstitutional use of license revocation may be severable from the remainder of the ordinance. In the absence of argument on the issue, we also decline to address the severability question. The ordinance violates plaintiffs' first amendment right of freedom of expression. Accordingly, we hold the ordinance facially invalid, and we affirm the District Court's judgment.

WELLFORD, Circuit Judge, concurring.

The City of Paducah originally sought to enforce the ordinance in question against Beltline News and Arcade Club (Beltline) and against the other defendant, Investment Entertainment, Inc. (Investment), in state court. The action against the

latter was successfully removed by Investment to federal district court, but the other is pending against Beltline in state court. The defense of abstention was presented by the City in its answer to Investment's complaint and amended complaint in the district court. This is the kind of factual situation in which abstention may be appropriate because the ordinance's scheme contemplates a full state court hearing before revocation of defendants' operating licenses and privileges becomes effective. State courts are fully competent to hear and to consider the constitutional challenges, federal and state, here made to the procedures involved in the disputed ordinance. The state court, of course, may first test the ordinance and its procedure under standards of the Kentucky Constitution; accordingly, it might

avoid the necessity of a decision on the federal Constitution in a complex and difficult area.

> Reflected among the concerns which have traditionally counseled a federal court to stay its hand are the desirability of avoiding unseemly conflict between the two sovereignties, the unnecessary impairment of state functions, and the premature determination of constitutional questions.

Martin v. Creasy, 360 U.S. 219, 224 (1959).

In Martin, the Court noted that the Pennsylvania law challenged as unconstitutional had not yet been construed by state courts, and there was "no reason to suppose that the Commonwealth of Pennsylvania will not accord full constitutional scope...." Id. at 225. This case would have been an appropriate vehicle for abstention since the district court might have awaited a decision of the state court in Beltline before deciding the sensitive

federal constitutional issue in Investment. However, because the City did not actively pursue the abstention issue before this court and has apparently not urged the state court promptly to render a decision in Beltline, this issue has been waived, although initially suggested by the City in its answer to the federal action. See Ohio Bureau of Employment Services v. Hodory, 431 U.S. 471, 479-80 (1977).

The difficulty in this area of the law is well expressed in the various viewpoints of the Justices set out in Vance v. Universal Amusement Co., 445 U.S. 308, 320 (1980). Perhaps the Supreme Court will determine whether an abatement or revocation of the kind contemplated in the Paducah ordinance will pass constitutional muster in deciding the case now pending before it for disposition. People ex rel. Arcara

v. Cloud Books, Inc., 119 Misc.2d 505, 465 N.Y.S.2d 633, later proceeding, 96 A.D.2d 751, 465 N.Y.S.2d 699 (1983), aff'd, 101 A.D.2d 163, 475 N.Y.S.2d 173 (1984), certified question answered and modified, 65 N.Y.2d 324, 491 N.Y.S.2d 307, cert. granted, 106 S.Ct. 379 (1985).

I emphasize, on the merits of this case, as found by Judge Merritt, that the procedural safeguards of the Paducah ordinance appear to be adequate solely in respect of the allegedly obscene materials because there is no prior restraint involved with regard to any claimed first amendment freedom of expression until after a judicial determination has been made on obscenity. It is the future effect of revocation of an operating license, the remedy that is provided, that is especially troublesome in this case.

We have recently stated with respect to a city ordinance dealing with an effort to control what was deemed to be potential obscene conduct in licensed clubs through revocation of an occupational license:

> We hold further that the ordinance does not constitute an impermissible prior restraint upon either present or future restricted expression. The appellants' argument that their zoning status would be altered if their occupational licenses were revoked does not constitute a reason to invalidate the ordinance as a prior restraint. In this case, prescreening discretion is not vested in any administrative body, as in Near v. Minnesota, 283 U.S. 697 (1931), and the dangers of censorship are not present.

Iacobucci v. City of Newport, Ky., 785 F.2d 1354, 1359 (6th Cir. 1986) (emphasis added).

I do not harbor the serious reservations of Judge Merritt that obscenity ordinances may not, under any circumstances, validly revoke a business

license of one dealing in obscenity, properly defined, in a particular location. A permanent revocation of license may be too broad a sanction in the situation before us. I have no problem, as did the district court, with the words "regular course of business" and "repeatedly" as used in the ordinance in question. I do not find them "vague" or overbroad, examined in context with their use in the ordinance.

I concur in the result reached by Judge Merritt in this case. I do not, however, adopt the rationale of J-R Distributors, Inc. v. Eikenberry, 725 F.2d 482 (9th Cir. 1984), rev'd on other grounds sub nom., Brockett v. Spokane Arcades, Inc., 105 S.Ct. 2794 (1985).

APPENDIX "B"

Opinion of the United States District Court, Western District of Kentucky at Paducah, Kentucky in City of Paducah v. Investment Entertainment, Inc., and Showtime Entertainment, Inc., Civil Action No. 83-0217-P(J), Consolidated with Investment Entertainment, Inc. v. City of Paducah, et al., Civil Action No. 83-0208P(J).

(Reference: Petition of Writ of Certiorari at page 2, line 12; page 14, line 14; page 19, lines 12 and 14).

....B-1 thru B-19

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CITY OF PADUCAH,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CIVIL ACTION
	)	NO. 83-0217-P(J)
INVESTMENT ENTERTAIN-	)	
MENT, INC., and SHOW-	)	
TIME ENTERTAINMENT,	)	
INC.,	)	
	)	
Defendants.	)	
	)	
CONSOLIDATED WITH:	)	
	)	
INVESTMENT ENTERTAIN-	)	
MENT, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CIVIL ACTION
	)	NO. 83-0208-P(J)
CITY OF PADUCAH,	)	
et al.,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION

These consolidated actions concern the constitutionality of Ordinance No. 83-6-2388 of the City of Paducah. The litigation was initiated in this court on August 3, 1983, with Investment

Entertainment, Inc. seeking a declaration that the ordinance was unconstitutional and a permanent injunction preventing the City from proceeding against Investment under the provisions of the ordinance. Investment's action was subsequently consolidated with an enforcement action brought against Investment in state court, and removed by Investment to this court. Investment's defense and counter-claim in the removal action are essentially the same as its claim in the original action, i.e., that the ordinance is unconstitutional and violates its rights under the First and Fourteenth Amendments to the United States Constitution. Investment's original action also presents a claim under 42 U.S.C. § 1983. Showtime Entertainment, Inc. was added as a party when it was learned that Showtime might

have an interest in the property involved in the enforcement action against Investment. (For convenience this opinion will refer only to Investment; however, the court's decision will also apply to Showtime).

Jurisdiction over Investment's original action exists under 28 U.S.C. Sections 1331, and 1343(3). Jurisdiction over the removal action exists under 28 U.S.C. § 1332, through the provisions in 28 U.S.C. § 1441. These matters are now before the court on cross motions for summary judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure.

Ordinance No. 83-6-2388 was enacted on June 14, 1983. It deals with the sale and exhibition of obscene materials, and attempts to prohibit sales and exhibitions through the City's power to declare and abate public

nuisances. The ordinance declares the following to be public nuisance *per se*:

(A) Any and every place in the City of Paducah where obscene films are publicly exhibited as a regular course of business, or possessed for the purpose of such exhibition.

(B) Any and every place in the City of Paducah where an obscene film is publicly and repeatedly exhibition, or possessed for the purpose of such exhibition; and

(C) Any and every obscene film which is publicly exhibited or possessed for such purpose at a place which is a public nuisance under this section.

City of Paducah, Ordinance No. 83-6-2388, Section 19-152. Also declared a public nuisance are:

(A) Any and every place of business in the City of Paducah in which obscene publications constitute all of the stock in trade, or a principal part thereof. Where such obscene publications constitute only a part of the stock in trade and are located in a place or places within such business which are capable of demarcation, such

> place or places constitute the public nuisance which requires abatement; and
>
> (B) Any and every obscene publication possessed at a place which is a public nuisance under this Section.

id. at Section 19-153. Additionally, the ordinance provides that once a certified copy of the ordinance and a certified copy of the resolution required under the ordinance have been served on the place in question, or on the persons responsible for the place, all monies paid as admission to the obscene exhibitions and all valuable consideration received for the sale of the obscene publications shall also be regarded as public nuisances. Id. at Sections 19-152 and 19-153.

The ordinance also prescribes procedures for identifying and abating the nuisances. The City's Board of Commissioners must initially make a

specific finding that a public nuisance exists. Id. at Section 19-155. Once this is determined, the Board, in order to implement the provisions of the ordinance, must pass a detailed resolution. The resolution must declare that a nuisance exists, describe its location, and set forth the facts on which the nuisance determination was based. Id. It must order that all operating licenses and permits associated with the declared nuisance be revoked (subject to confirmation by mandatory judicial proceedings), that the nuisance be abated, and that specific notice be given to those persons deemed to have knowledge of the nuisance. Id. The resolution must also order the Corporate Counsel to initiate judicial proceedings to abate the nuisance. Id. The judicial proceedings are to be initiated within five working

days after passage of the resolution. Id. at Section 19-156. In those proceedings, the Corporate Counsel must seek a court order that the materials in question are obscene, that the places in question are public nuisances, and that the Board's action in revoking the operating licenses and permits was lawful. Id. The Ordinance also directs the Corporate Counsel to seek an injunction against the persons maintaining the nuisance, enjoining them from selling or exhibiting the materials declared to be obscene and from possessing the materials for purposes of sale or exhibition. Finally, the Corporate Counsel must seek an order of forfeiture against the obscene films and publications, and all monies determine by the court to have been received through their exhibition and sale. Id.

On August 3, 1983, the City's Board of Commissioners utilized Ordinance No. 83-6-2388 to take action against Investment. Through the required resolution, the Board declared that Investment, and all materials possessed by Investment, were public nuisances, ordered that Investment's operating licenses and permits be revoked (subject to judicial confirmation), and ordered the Corporate Counsel to initiate the necessary judicial proceedings. The Board's findings and resolution were based solely upon testimony from an undercover policeman who visited Investment on June 22, July 2, and July 10, 1983, and the Board's examination of two video tapes and two magazines purchased by the undercover policeman.

DISCUSSION

For summary judgment purposes, Investment concedes that the video tapes

and magazines examined by the Board are "obscene." Furthermore, Investment does not challenge the constitutionality of the "obscene matter" definition contained in the ordinance. Investment does contend that the provisions of the ordinance, and the actions taken against it pursuant to those provisions, violate constitutional guarantees of due process. Investment also contends that the ordinance imposes an impermissible prior restraint on speech and impermissibly punishes protected speech.

Investment's due process argument centers around procedural and evidentiary matters. Specifically, it contends that a determination that Investment and all materials possessed there are public nuisances is unconstitutional, if it is based solely upon general testimony from an officer who visited the business, and a finding

that two video tapes and two magazines purchased from the business are obscene. This argument fails to recognize that the actions taken by the Board of Commissioners had no binding effect on whether Investment, or any of the materials possessed by Investment, would ultimately be determined to be a public nuisance and subjected to closure or forfeiture. The only effect of the Board's action was the initiation of judicial proceedings against investment. The ordinance recognizes that all final and binding determinations must be made by the court involved in the judicial proceedings. Due process does not require that decisions to initiate judicial proceedings be made pursuant to some type of evidentiary standard or that they be made only after notice has been given to the affected parties. Viewed strictly as a means of

determining when to initiate judicial proceedings, the ordinance does not violate due process. See Buena Vista Cinema, 129 Cal. Rptr. 315, 318 (Cal. Ct.App. 1976).

The ordinance does not, however, serve solely as a means for determining when to initiate judicial proceedings. Indeed, although the ordinance leaves the ultimate procedural and evidentiary standards in the hands of the court conducting the required judicial proceedings, it expressly defines the property constituting a "public nuisance," thereby establishing the scope of the judicial proceedings and setting the standard for the substantive nuisance determination. Investment's prior restraint and impermissible punishment of protected speech arguments relate to these public nuisance declarations. Investment does not

contend that it is improper for the City to declare what property constitutes a public nuisance, or even that it is improper for the City to declare that obscene materials constitute a public nuisance, subject to proper procedural safeguards; however, Investment does contend that Ordinance No. 83-6-2388 declares property to be a public nuisance in a way which impermissibly punishes non-obscene, protected speech. The court agrees. Attempts to regulate obscenity must be drafted in a manner that will "ensure against the curtailment of constitutionally protected expression, which is often separated from obscenity only by a dim and uncertain line." Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 66, 83 S.Ct. 631, 637 (1963). Accordingly, constitutional guarantees of freedom of speech mandate that laws regulating

speech be carefully drawn so as to punish only unprotected speech and not intrude upon protected expression. Gooding v. Wilson, 405 U.S. 518, 522, 92 S.Ct. 1103, 1106 (1972). Ordinance No. 83-6-2388 intrudes upon protected speech by declaring an entire place of business to be a public nuisance upon a finding that the place publicly and repeatedly exhibits obscene films, exhibits obscene films as a regular course of business, possesses obscene films for such exhibitions, or maintains obscene publications as its principal stock in trade. See Ordinance No. 83-6-2388 at Sections 19-152 and 19-153. By focusing on the places of sale and exhibition, rather than merely upon the materials sold or exhibited, the ordinance intrudes upon protected speech. Specifically, it prevents an entire place from disseminating

constitutionally protected, non-obscene materials, simply because the place has sold or exhibited obscene materials in the past. The dangers of such a ban are readily illustrated. For example, a movie theatre that showed The Ten Commandments, Snow White, or Gone With the Wind during the week could be closed and prevented from showing any movies, if it happened to show a film each Saturday night at midnight that was ultimately determined to be obscene, assuming that once a week constitutes "repeatedly" exhibiting. Similarly, an entire book store could be closed if it sold materials later determined to be obscene, even if the store also sold The Bible, A Tale of Two Cities, and The New York Times. Such all-encompassing prohibitions directed at places of sale or exhibition are unconstitutional. See J-R Distributors, Inc. v. Eikenberry,

725 F.2d 482, 494 (9th Cir. 1984), prob. juris. noted, ___U.S.___, 105 S.Ct. 77 (1984). See also Universal Amusement Co. v. Vance, 587 F.2d 159, 165-166 (5th Cir. 1978). (en banc), aff'd. 445 U.S. 308, 100 S.Ct. 1156 (1980); People ex rel. Busch v. Projection Room Theater, 550 P.2d 600 (Cal. 1976), cert denied, 429 U.S. 922, 97 S.Ct. 320 (1976). See generally Cornflower Entertainment, Inc. v. Salt Lake City Corp., 485 F.Supp. 777, 785-786 (D. Utah 1980); State v. A Motion Picture Entitled "The Bet," 547 P.2d 760 (Kan. 1976). Moreover, because the ordinance allows the entire business to be declared a public nuisance, it encourages a business person to steer wide of danger by avoiding questionable but nonetheless protected films and publications. See Vance, 587 F.2d at 166. Thus, given that the line between protected and unprotected speech is dim

and uncertain, the broad closure provision contained in Ordinance No. 83-6-2388 will result in self-censorship of protected but questionable materials as business persons avoid those materials in an effort to prevent their entire business from being declared a public nuisance. Thus, a new Ulysses might never be disseminated because of the threat of having the entire place of business closed if the questionable item was later determined to be obscene. See Vance, 587 F.2d at 166. Ordinance No. 83-6-2388 especially encourages self-censorship by its vague standards. The ordinance does not define "regular course of business," "repeatedly," or "principal part," yet it uses these terms to draw the line at where a place selling or exhibiting obscene materials becomes a public nuisance. Ordinance No. 83-6-2388 at Sections 19-152 and

19-153. There is no way that a business person could know in advance whether once-a-week or once-a-day amounted to "repeatedly" or whether two magazines or twenty magazines constituted a "principal part."

CONCLUSION

Materials which have been properly determined to be legally obscene are not within the free speech protection afforded by the constitution and, therefore, are subject to regulation. See Sullivan, 372 U.S. at 65, 83 S.Ct. at 637. Accordingly, although the issue is not squarely presented in the present case, an ordinance which focused a government's public nuisance powers solely upon obscene materials would not appear to be invalid. On the other hand, non-obscene materials are entitled to great protection, and therein lies the danger of Ordinance No. 83-6-2388.

By going beyond the obscene materials themselves and focusing on the places where the obscene materials are sold or exhibited, the ordinance improperly intrudes upon protected expression. Because of this focus on places rather than materials the court finds that Sections 19-152(A) and (B) and Section 19-153(A) are unconstitutional. See Eikenberry, 715 F.2d at 493-496, and cases cited therein; Vance, 587 F.2d at 164-166; Busch 550 P.2d at 600. The City has cited one case supporting a contrary conclusion, State ex rel. Kidwell v. U.S. Marketing, 631 P.2d 622 (Idaho 1981), however, the court has chosen to rely upon the cases cited above; cases which direct a finding that the ordinance provisions are unconstitutional. The court further concludes that Section 19-152(C) and Section 19-153 (B) are dependent upon

the nuisance declarations in Sections 19-152(A) and (B) and Section 19-153(A) and, therefore, are also unconstitutional. The sections are dependent because even though they refer to materials rather than places, they only refer to materials which are sold or exhibited at places defined as public nuisances under the sections which the court has declared unconstitutional.

An appropriate order will be entered.

DATED: 1-5-85

Edward H. Johnstone, Judge
United States District Court

APPENDIX "C"

City of Paducah, Kentucky Public Nuisance Abatement Ordinance No. 83-6-2388, passed by the Board of Commissioners of Paducah, Kentucky on June 14, 1983.

(Reference: Petition for Writ of Certiorari at page 5, line 19; page 9, line 17; page 11, lines 2, 5, 14).

....C-1 thru C-29

ORDINANCE NO. 83-6-2388

AN ORDINANCE OF THE CITY OF PADUCAH DECLARING THE COMMERCIAL EXPLOITATION OF OBSCENE MOTION PICTURE FILMS AND OBSCENITY PUBLICATIONS TO BE CONTRARY TO PUBLIC HEALTH, SAFETY, AND GENERAL WELFARE, AND A PUBLIC NUISANCE; DECLARING ANY PLACE DISPLAYING OR EXHIBITING SUCH OBSCENE MOTION PICTURE FILMS OR PUBLICATIONS TO BE A PUBLIC NUISANCE PER SE; MAKING ALL OBSCENE MATTER AND PUBLICATIONS POSSESSED IN SUCH PLACES A PUBLIC NUISANCE PER SE; PROVIDING FOR NOTICE AND LEGAL PROCEEDINGS TO ABATE THE SAME; AND PROVIDING A PROCEDURE FOR ASSESSMENT AND COLLECTION OF COSTS OF ABATEMENT.

BE IT ORDAINED BY THE BOARD OF COMMISSIONERS OF THE CITY OF PADUCAH, KENTUCKY:

Section 1. That the Board of Commissioners create Article VII of

Chapter 19 of the Code of Ordinances of the City of Paducah by adopting Sections 19-150, 19-151, 19-152, 19-153, 19-154, 19-155, 19-156, and 19-157 to read as follows:

"SECTION 19-150. PURPOSE; POLICY; AUTHORITY; APPLICATION.

The Board of Commissioners find that the crass commercial exploitation of explicit sexual conduct through the public exhibition of obscene films and the sale of obscene publications, constitutes a debasement and distortion of a sensitive key relationship of human existence, central to family life, community welfare and the development of human personality; that such exploitation is indecent and offensive to the senses and to public morals and interferes with the interest of the public in the quality of life and total community environment, the tone of

commerce in the City, property values, and the public safety; and that the continuation of such activities is detrimental to the best health, safety, convenience, good morals, and general welfare of the City of Paducah and of the residents, citizens, inhabitants, and business thereof and is unlawful and may not be made the subject of a lawful license. Pursuant to Section 82.082 of the Kentucky Revised Statutes, the Board of Commissioners hereby declares such activities to be public nuisances, and establishes procedures for the abatement thereof and for the assessment and collection of costs of abatement which may be incurred by the City incident to such abatement. This ordinance shall apply to existing establishments which are presently engaged in the activities herein declared to be public nuisances.

"SECTION 19-151. DEFINITIONS.

(A) "Knowledge" or "knowledge of such nuisance" means having knowledge of the contents and character of the patently offensive sexual conduct which appears in the obscene matter.

(B) "Obscene matter" means matter, taken as a whole, the predominant appeal of which to the average person, applying contemporary standards, is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion; and is matter which taken as a whole goes substantially beyond customary limits of candor in description or representation of such matters; and is matter which taken as a whole is utterly without redeeming social importance.

(1) The predominant appeal to prurient interest of the matter is judged with reference to average adults

unless it appears from the nature of the matter or the circumstances of its dissemination, distribution or exhibition, that it is designed for clearly defined deviant sexual groups, in which case the predominant appeal of the matter shall be judged with reference to its intended recipient group.

(2) Where circumstances of production, presentation, sale, dissemination, distribution, or publicity indicate that matter is being commercially exploited by the defendant for the sake of its prurient appeal, such evidence is probative with respect to the nature of the matter and can justify the conclusion

that the matter is utterly without redeeming social importance.

Nothing herein contained is intended to include or proscribe any matter which, when considered as a whole, and in the context in which it is used, possesses serious literary, artistic, political or scientific value.

(C) "Matter" shall mean a motion picture film or a publication, or both;

(D) "Motion picture film" shall include any:

(1) film or plate negative;

(2) film or plate positive;

(3) film designed to be projected on a screen for exhibition;

(4) films, glass slides or transparencies, either in negative or positive form designed for exhibition by projection on a screen;

(5) Video tape or any other medium used to electronically reproduce images on a screen.

(E) "Person" means any individual, partnership, firm, association, corporation, or other legal entity;

(F) "Place" includes, but is not limited to, any building, structure or place, or any separate part or portion thereof, whether permanent or not, or the ground itself. "Place" also includes any money, slug or coin-operated vending machine, or mechanical or electronically controlled vending machine, which is located upon or is accessible from a public sidewalk or thoroughfare;

(G) "Publication" shall include any book, magazine, newspaper, article, pamphlet, writing, printing, illustration, picture, sound recording, or a motion picture film when such film

is offered for sale or exhibited in a coin-operated machine.

(H) "Sale" means a passing of title or right of possession from a seller to a buyer for valuable consideration, and shall include, but is not limited to, any lease or rental arrangement or other transaction wherein or whereby any valuable consideration is received for the use of, or transfer of possession of, obscene matter.

SECTION 19-152. OBSCENE FILMS AND THEATERS EXHIBITING THE SAME DECLARED A PUBLIC NUISANCE PER SE; ADMISSION PRICE RECEIVED AFTER SERVICE OF RESOLUTION TO BE REGARDED AS A PUBLIC NUISANCE PER ACCIDENS.

The following are declared to be public nuisances per se:

(A) Any and every place in the City of Paducah where obscene films are publicly exhibited as a regular course

of business, or possessed for the purpose of such exhibition;

(B) Any and every place in the City of Paducah where an obscene film is publicly and repeatedly exhibited, or possessed for the purpose of such exhibition; and

(C) Any and every obscene film which is publicly exhibited or possessed for such purpose at a place which is a public nuisance under this section.

From and after service on the theater, or its manager, or acting manager, or person then in charge of such place, of a certified copy of this ordinance and a certified copy of the resolution provided for herein, all monies paid thereafter as admission price to such exhibitions shall be regarded as being a public nuisance per accidens, as personal property used in conducting and maintaining a declared

public nuisance as to which forfeiture will be requested in the judicial proceedings required herein.

"SECTION 19-153. PLACE OF BUSINESS IN WHICH OBSCENE PUBLICATIONS CONSTITUTE A PRINCIPAL PART OF THE STOCK IN TRADE AND OBSCENE PUBLICATIONS POSSESSED THEREIN DECLARED A PUBLIC NUISANCE PER SE; VALUABLE CONSIDERATION RECEIVED FOR SALE AFTER SERVICE OF RESOLUTION TO BE REGARDED AS A PUBLIC NUISANCE PER ACCIDENS.

The following are declared to be public nuisances per se:

(A) Any and every place of business in the City of Paducah in which obscene publications constitute all of the stock in trade, or a principal part thereof. Where such obscene publications constitute only a part of the stock in trade and are located in a place or places within such business

which are capable of demarcation, such place or places constitute the public nuisance which requires abatement; and

(B) Any and every obscene publication possessed at a place which is a public nuisance under this Section.

From and after service on the place, or its manager, or acting manager, or person then in charge of such place, of a certified copy of this ordinance and a certified copy of the resolution provided for herein, all valuable consideration received for the sale of such obscene publications shall be regarded as being a public nuisance per accidens, as personal property used in conducting and maintaining a declared public nuisance, as to which forfeiture will be requested in the judicial proceedings required herein.

"SECTION 19-154. KNOWLEDGE OF NUISANCE PRESUMED FROM SERVICE OF COPY OF RESOLUTION; RESPONSIBILITY OF PARTIES THEREFOR; ABATEMENT OF SUCH NUISANCES.

(A) Upon receiving notice through service of a certified copy of this ordinance and of a certified copy of the resolution provided for herein, any and every person who shall own, legally or equitably, lease, maintain, manage, conduct, or operate a place in the City of Paducah which is declared to be a public nuisance as set forth and stated in Section 19-152 or Section 19-153 of the Code of Ordinances of the City of Paducah, is deemed to be a person who has knowledge of such nuisance for the purpose of this ordinance and is, thereafter, responsible for its maintenance, and shall be liable therefor.

(B) The places and subject matter declared to be public nuisances under Section 19-152 or Section 19-153 of the Code of Ordinances of the City of Paducah shall be abated, as provided for herein.

"SECTION 19-155. ACTION TO BE TAKEN BY BOARD OF COMMISSIONERS.

Upon a specific finding that a public nuisance, as defined in Section 19-152 or Section 19-153 of the Code of Ordinances of the City of Paducah, exists in the City of Paducah, the Board of Commissioners, in applying the provisions of this ordinance to such nuisance, shall provide for the following by resolution:

(A) Declare the fact that such nuisance exists;

(B) Set forth the description or legal description and street address of the real property which constitutes the nuisance.

(C) Set forth a statement of facts upon which the Board of Commissioners' declaration of nuisance is based;

(D) Order the revocation of all licenses and permits which have been issued as a part of the operation of such business, subject to confirmation by the court in the judicial proceedings required herein. Criminal proceedings for transacting business without a license at such address shall not be filed until the order of license revocation by the Board of Commissioners has been confirmed by judicial order;

(E) Order the Corporation Counsel to give written notice to all persons named in Section 19-154(a) of the Code of Ordinance of the City of Paducah, public nuisances immediately, by terminating the exhibitions of such obscene film or films and sale or offering for sale of such publications,

or causing the same to be terminated;

(F) Order the Corporation Counsel to proceed as directed in Section 19-156 of the Code of Ordinances of the City of Paducah and do all things necessary to abate such public nuisance through judicial proceedings and to conclude such proceedings as expeditiously as is permissible under the law;

(G) Inform and give notice to persons named in Section 19-154(A) of the Code of Ordinances of the City of Paducah that:

(1) The Board of Commissioners has determined that a public nuisance presently exists at such place and address, and has revoked the licenses and permits at that place, subject to court confirmation, and that, under Section 19-154 of the Code of Ordinances of the

City of Paducah they are deemed to have knowledge thereof and are responsible therefor;

(2) The Board of Commissioners has ordered the Corporation Counsel, as provided for under Section 19-156 of the Code of Ordinances of the City of Paducah, to commence legal proceedings naming such persons as defendants in a civil action to abate the same judicially, and to seek recovery in said action of the costs of abatement, including investigative costs, court costs, attorney fees, and other expenses and that under Section 19-157 of the Code of Ordinances of the City of Paducah, the costs of

abatement are made a special assessment against the parcel of land upon which the nuisance is maintained, but only against the interest, if any therein, of the person responsible for maintaining such nuisance and, upon their determination by the Board of Commissioners, will, by separate resolution, be made a lien against the real property interest of the person responsible for maintaining such nuisance;

(3) All obscene motion picture film or films or obscene publications being used in conducting and maintaining such public nuisances are considered to be contraband and the subject of forfeiture;

(4) The obscene motion picture film or films or obscene publications which are being used in conducting and maintaining such public nuisance will be needed at the hearing in the court having jurisdiction of the legal proceedings brought by the Corporation Counsel.

(5) From and after service on the place or its manager or acting manager, or person then in charge of such place, of a certified copy of this ordinance and a certified copy of such resolution, any and all monies paid as admission price to the exhibition or exhibitions of such obscene motion picture films, and valuable consideration

received for the sale of such obscene publications, shall be regarded as being a public nuisance per accidens, as personal property used in conducting and maintaining such nuisance, and as gain derived from a wrongful act, and that forfeiture of the same will be requested in the judicial proceedings required herein;

(H) Order that a certified copy of said resolution and a certified copy of this ordinance be delivered forthwith in any manner normally used to effectuate personal service of process as to all persons of record having any legal or equitable interest in the real property and to the regular or acting manager or persons in charge of the place therein declared a public nuisance.

"SECTION 19-156. ACTION TO BE TAKEN BY DISTRICT ATTORNEY.

Upon a specific finding by resolution of the Board of Commissioners of the fact that a public nuisance exists at a particular location, the Corporation Counsel shall:

(A) Forthwith, but not later than five (5) working days after passage of said resolution, commence legal proceedings by the filing of a civil action seeking the following relief:

(1) an order that the subject matter identified by the Board of Commissioners in said resolution is obscene as defined herein;

(2) an order that each place named by the Board of Commissioners is a public nuisance and that the action taken by the Board of Commissioners to revoke the

licenses issued to that place of business was lawful;

(3) an injunction enjoining and restraining all persons maintaining said nuisance from possessing or publicly exhibiting said obscene motion picture films, or from selling or possessing for sale said obscene publications at any time in the future in the City of Paducah, and such other injunctive relief as the court may order;

(4) an order that all positive prints of such obscene films and all such obscene publications or copies of reproductions thereof be forfeited as contraband;

(5) an accounting of all monies paid as admission price to the

exhibition or exhibitions of such obscene motion picture films and valuable consideration received for the sale of such obscene publications from and after the time the person or persons maintaining said nuisance received a copy of the resolution of the Board of Commissioners' finding that a public nuisance and a judgment that such monies are gain derived from a wrongful act and a public nuisance;

(6) an order that all admission price monies or valuable consideration received and enumerated in the court ordered accounting be forfeited as required by law;

(7) judgment of the City of Paducah for all costs expended in abating the public nuisance, including investigative costs, court costs, reasonable attorney fees, and such other expenses as are provided for herein; and

(8) all other relief as the court may deem proper.

(B) File a notice of the pendency of the action in the office of the McCracken County Clerk, giving the names of the parties, the object of the action, and a description of the property thereby affected.

"SECTION 19-157. COST OF ABATEMENT; ASSESSMENT; ASSESSMENT REPORT; HEARING ON ASSESSMENT REPORT; ASSESSMENT RESOLUTION; COLLECTION.

(A) The cost of abatement is hereby declared a special assessment against the parcel of land upon which the public nuisance is maintained, but only against the interest, if any therein, of the person or persons determined in the action to be responsible for maintaining such nuisance. As used herein, the term "cost of abatement" shall include, but is not limited to, the following: (1) investigative costs; (2) court costs; (3) reasonable attorney fees; and (4) printing costs for any trial and appeal.

(B) Upon the filing of a County Court judgment adjudicating the existence of a public nuisance in any proceedings instituted pursuant to these sections, the Corporation Counsel shall file with the City Clerk a written report containing his account of the expenses of abatement, the person or

persons determined in the action to be responsible for maintaining such nuisances, a description of the premises on which such abatement occurred, and the assessment against each lot or parcel of land proposed to be levied to pay the cost thereof. The clerk shall then set the report for hearing by the Board of Commissioners and shall, not less than ten (10) days prior to the date set for such hearing, serve notice of assessment upon the owners, which notice shall specify the day, hour and place when the Board of Commissioners shall hear and pass upon the assessment report together with any objections or protests thereto.

(C) Upon the date and hour fixed for the hearing, the Board of Commissioners shall hear and pass upon the assessment report together with any objections or protests which may be

raised by any of the owners of any property liable to be assessed for the costs of abatement of any other interested persons. The Board of Commissioners may make such revision, correction or modifications in the report as it may deem just, after which the report as submitted, or as revised, corrected or modified, shall be confirmed. The Board of Commissioners may adjourn the hearings from time to time. The decisions of the Board of Commissioners on all protests and objections which may be made shall be final and conclusive.

(D) Upon confirmation of the assessment report, the Board of Commissioners shall adopt a resolution specifying the amount assessed against each respective parcel as shown on the last available assessment roll in accordance with the assessment report.

Unless otherwise provided in such resolution, any such assessment shall become due thirty (30) days after adoption of such resolution and shall thereafter bear interest at the rate of fifteen per cent (15%) per year. The Board of Commissioners may provide in the resolution for payment to become due at any later date, in total sum or in installments.

(E) All assessments may be paid by tender of the amount due to the City Treasurer. The City Treasurer, prior to August 10 of each year, shall determine if any assessment, or portion thereof, is due and unpaid, and if he so determines, such assessment shall be collected at the same time and in the same manner as ordinary City taxes are collected and shall be subject to the same penalties and the same procedure and sale in case of delinquency as

provided for ordinary City taxes. All laws applicable to the levy, collection and enforcement of municipal taxes shall be applicable to the levy, collection and enforcement of municipal taxes shall be applicable to such special assessment.

SECTION 2. If any section, subsection, sentence, clause, phrase or portion of this ordinance is for any reason held to be invalid or unconstitutional by the decision of any court of competent jurisdiction, such decision shall not affect the validity of the remaining portions of this ordinance. The Board of Commissioners of the City of Paducah hereby declares that it would have adopted this ordinance and each section, subsection, sentence, clause, phrase or portion thereof irrespective of the fact that any one or more sections, subsections,

sentences, clauses, phrases or portions be declared invalid or unconstitutional.

SECTION 3. This ordinance shall be read on two separate days and will be effective upon publication of a certified summary thereof.

_____
Mayor

Introduced by the Board of Commissioners May 31, 1983

Passed by the Board of Commissioners June 14, 1983

Recorded by Louise McKinney, City Clerk, June 14, 1983

Published by The Paducah Sun June 20, 1983.

APPENDIX "D"

Resolution of the Board of Commissioners of the City of Paducah, Kentucky passed August 3, 1983, finding the business known as Tammy's Book Store To Be A Public Nuisance Pursuant to Section 19-153 of the Code of Ordinances of the City of Paducah As A Place of Business In Which Obscene Publications Constitute All of the Stock in Trade or a Principle Part of the Stock in Trade and Revoking All Licenses and Permits Except That No Criminal Proceedings May Be Filed for Transactions Business Without A License Until The Fact of Public Nuisance Has Been Confirmed by a Decree of the McCracken County Court in Judicial Proceedings.

(Reference: Petition for Writ of Certiorari at page 13 line 3).

....D-1 thru D-16

RESOLUTION

WHEREAS, on the 14th day of June, 1983, the Board of Commissioners of the City of Paducah adopted Ordinance No. 83-6-2388 declaring the commercial exploitation of obscene motion picture films and obscene publications to be contrary to the public health, safety, and general welfare, and a public nuisance, and

WHEREAS, on June 22, 1983, Officer Kermit Perdew visited a business located at 243 Brown Street, Paducah, Kentucky, known as Tammy's Book Store, and

WHEREAS, at that time said officer observed motion pictures, magazines, and other material which taken as a whole the appeal to the average person is to the prurient interest and the matter, taken as a whole, lacks any redeeming social importance, and

WHEREAS, on July 2, 1983 Officer Kermit Perdew returned to the place of business known as Tammy's Book Store and purchased the following material:

"EROTIC INTERLUDE", (Where one man's woman is another man's pleasure), a video tape (Beta); and "BACK DOOR" NUMBER TWO ("Come with us on a Journey and see just how much fun, anal sex can be!"), and

WHEREAS, on July 10, 1983, Officer Kermit Perdew again went to the premises of Tammy's Book Store and purchased the following material: "THE FILTHY RICH" (the secret pleasures of those who have it made), a video tape (Beta); and "MR/MRS" ("he had this thing for women's clothes.), and

WHEREAS, the Board of Commissioners conducted a public hearing on August 3, 1983, at the hour of 1:00 p.m. at which time the Board of Commissioners reviewed all of the above mentioned materials.

NOW THEREFORE, BE IT RESOLVED BY THE BOARD OF COMMISSIONERS OF THE CITY OF PADUCAH, AS FOLLOWS:

SECTION 1. The Board of Commissioners hereby finds the following facts: On July 2, 1983, the place of business located at 243 Brown Street, Paducah, Kentucky, known as Tammy's Book Store, sold the following materials:

Caballero Control Corporation Presents "EROTIC INTERLUDE", (Where one man's women is another man's pleasure). A video tape (Beta) with approximate running time of 84 minutes.

This material contains numerous explicit scenes of sex acts between males and females, females and females, including natural and contorted sexual intercourse, felatio and cunnilingus,

The Board of Commissioners after reviewing said material on August 3, 1983, finds that said material is

obscene under the ordinance of the City of Paducah and the statutes of the Commonwealth of Kentucky, in that the matter taken as a whole, the predominant appeal to the average person, applying contemporary community standards, is to the prurient interest. The material, taken as a whole, goes substantially beyond customary limits of candor of description and representation of such matters and, taken as a whole, the material is utterly without redeeming social importance.

SECTION 2. The Board of Commissioners hereby finds the following facts: On July 2, 1983, the place of business located at 243 Brown Street, Paducah, Kentucky, known as Tammy's Book Store, sold the following materials: "BACK DOOR" NUMBER TWO ("Come with us on a Journey and see just how much fun, anal sex can be!") from the publishers of Swedish Erotica Magazine and Books.

A 36 slick-page magazine containing color photographs in an explicit manner, sexual relations between men and women, including sexual intercourse (both natural and contorted) and acts of cunnilingus and felatio, and anal intercourse.

The Board of Commissioners after reviewing said material on August 3, 1983, finds that said material is obscene under the ordinances of the City of Paducah and the statutes of the Commonwealth of Kentucky, in that the matter taken as a whole, the predominant appeal to the average person, applying contemporary community standards, is to the prurient interest. The material, taken as a whole, goes substantially beyond customary limits of candor of description and representation of such matters and, taken as a whole, the material is utterly without redeeming social importance.

SECTION 3. The Board of Commissioners hereby finds the following facts: On July 10, 1983, the place of business located at 243 Brown Street, Paducah, Kentucky, known as Tammy's Book Store, sold the following material:

Swedish Erotica presents (distributed by Caballero Control Corporation) "THE FILTHY RICH" (the secret pleasures of those who have it made). A video tape (Beta) with approximate running time of 80 minutes.

The material contains numerous explicit scenes of sex acts between males and females, including natural and contorted sexual intercourse, felatio and cunnilingus, and masturbation.

The Board of Commissioners after reviewing said material on August 3, 1983, finds that said material is obscene under the ordinances of the City of Paducah and the statutes of the

Commonwealth of Kentucky, in that the matter taken as a whole, the predominant appeal to the average person, applying contemporary community standards, is to the prurient interest. The material, taken as a whole, goes substantially beyond customary limits of candor of description and representation of such matters and, taken as a whole, the material is utterly without redeeming social importance.

SECTION 4. The Board of Commissioners hereby finds the following facts: On July 10, 1983, the place of business located at 243 Brown Street, Paducah, Kentucky, known as Tammy's Book Store, sold the following material:

"MR/MRS" (he had this thing for women's clothes.) From the publishers of Swedish Erotica magazines and books.

A 36 click-page magazine containing color photographs depicting in an

explicit manner sexual relations between men and women, including sexual intercourse (both natural and contorted) and acts of cunnilingus and felation.

The Board of Commissioners after reviewing said material on August 3, 1983, finds that said material is obscene under the ordinances of the City of Paducah and the statutes of the Commonwealth of Kentucky, in that the matter taken as a whole, the predominant appeal to the average person, applying contemporary community standards, is to the prurient interest. The material, taken as a whole, goes substantially beyond customary limits of candor of description and representation of such matters and, taken as a whole, the material is utterly without redeeming social importance.

SECTION 5. The Board of Commissioners of the City of Paducah

hereby finds that the business known as Tammy's Book Store is owned and operated by Investment Entertainment, Inc. with its principal place of business at 243 Brown Street, Paducah, Kentucky.

SECTION 6. The Board of Commissioners hereby finds that the business known as Tammy's Book Store is a public nuisance and that all material possessed at 243 Brown Street, Paducah, Kentucky is a public nuisance pursuant to Section 19-152 and 19-153 of the Code of Ordinances of the City of Paducah.

SECTION 7. Tammy's Book Store is located at 243 Brown Street, Paducah, Kentucky, more particularly described as follows:

> Beginning on the south side of Brown Street at a tack of distance of 94.32 feet in a westerly direction from a southwest intersection of Brown Street and Beltline Highway (now Irvin Cobb Drive); thence at a right angle in a southerly direction a distance of 125 feet to an iron pipe; thence at

a right angle in a westerly direction a distance of 50 feet to an iron rod; thence at a right angle in a northerly direction a distance of 125 feet to an iron rod on the south line of Brown Street; thence with the south line of Brown Street at a right angle a distance of 50 feet in an easterly direction to the point of beginning.

Beginning the same property in all respects that was conveyed to Investment Entertainment, Inc. by deed dated the 21st day of March, 1983, and recorded in Deed Book 653, Page 239, in the McCracken County Court Clerk's Office.

SECTION 8. The Board of Commissioners hereby orders revocation of all licenses and permits that have been issued as a part of the operation of Tammy's Book Store and/or Investment Entertainment, Inc. subject to confirmation by the McCracken Circuit Court in judicial proceedings hereinafter required.

SECTION 9. The Board of Commissioners hereby orders the Corporation Counsel to give written

notice to all persons associated with 243 Brown Street, Paducah, Kentucky, including but not limited to Investment Entertainment, Inc., all employees and managers of Tammy's Book Store and/or Investment Entertainment, Inc. to abate the public nuisances immediately by terminating the exploitation of obscene film or films for sale or offering for sale of such publication or causing the same to be terminated.

SECTION 10. The Board of Commissioners further orders the Corporation Counsel to proceed as directed under Section 19-156 of the Code of Ordinances of the City of Paducah and to do all things necessary to abate such public nuisance through judicial proceedings and to conclude such proceedings as expeditiously as possible under the law. It is ordered that a certified copy of this Resolution

shall be served on the statutory agent of Investment Entertainment, Inc., all officers and employees and agents thereof, which can be found within the City of Paducah, that said business has been declared a public nuisance and has revoked the licenses and permits at that place, subject to court confirmation, and that under Section 19-154 of the Code of Ordinances of the City of Paducah they are deemed to have knowledge thereof and are responsible therefor. They shall further be notified that the Board of Commissioners has ordered the Corporation Counsel as provided under Section 19-156 of the Code of Ordinances of the City of Paducah to commence legal proceedings naming such persons as defendants in a civil action to abate the same judicially and to seek recovery in said action of the cost of said abatement,

including investigation costs, court costs, attorneys fees, and other expenses and under Section 19-157 of the Code of Ordinances of the City of Paducah. The costs of abatement are made a special assessment against the parcel of land upon which the business is maintained.

The Board of Commissioners, will, by separate resolution, place a lien against the real property interest or the person responsible for maintaining such nuisance. Said persons are to be further informed that all obscene motion picture film or films or obscene publications being used and maintaining such public nuisance are considered to be contraband and subject to forfeiture. Said persons are to be further notified that the obscene motion picture film or films or obscene publications which are being used in conducting and maintaining

such public nuisance will be needed at the hearing in court having jurisdiction of legal proceedings brought by the Corporation Counsel. Said persons shall further be notified that from and after the serving of notice on the place or its managing or acting manager or person then in charge of such place, or a certified copy of Ordinance No. 83-6-2388 of the City of Paducah and a certified copy of this Resolution, any and all monies paid as admission price to exhibitions of such obscene motion picture films, and valuable consideration received for the sale of such obscene publications, shall be regarded as a public nuisance per accident as personal property used in conducting and maintaining such nuisance, and as being gain derived from a wrongful act, and the forfeiture of same will be requested in the judicial proceedings required herein.

SECTION 11. The Board of Commissioners hereby orders that a certified copy of this Resolution and that a certified copy of Ordinance No. 83-6-2388 be delivered forthwith by the Police Department of the City of Paducah, or by certified mail properly deposited with the United States Post Office to all person of record having any legal or equitable interest in the real property, and to the regular or acting manager or person in charge of the place therein, declared a public nuisance.

SECTION 12. This Resolution is adopted according to law, and shall be effective immediately upon its adoption.

_____
Mayor

Passed by the Board of Commissioners August 3, 1983

Recorded by Louise McKinney, City Clerk, August 3, 1983.

I hereby certify that the above is a true and correct copy of a Resolution adopted by the City of Paducah on August 3, 1983.

_____

City Clerk

APPENDIX "E"

Complaint in the United States District Court For the Western District Of Kentucky, at Paducah, entitled "Investment Entertainment, Inc. v. City of Paducah, et al.," Civil Action File No. C83-0209P(J), filed August 3, 1983.

(Reference: Petition for Writ of Certiorari at page 3 line 10; page 15, line 16).

....E-1 thru E-8

Amended Complaint in the United States District Court For The Western District Of Kentucky at Paducah, entitled "Investment Entertainment, Inc. v. City of Paducah, et al.", Civil Action File No. 83-0208-P(J), August 10, 1983.

....E-9 thru E-15

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH
Civil Action File No. C83-0208P(J)

INVESTMENT ENTERTAINMENT, INC.	)	
PLAINTIFF	)	
VS.	)	COMPLAINT
CITY OF PADUCAH: JOHN K. PENROD, AS MAYOR, AND JOE VITERISI, ROBERT A. COLEMAN, HAROLD (SHORTY) FORD AND JAMES W. FLYNN, AS COMMISSIONERS OF SAID CITY: JAMES W. UTTER, AS CORPORATION COUNSEL, AND THURMAN BAKER, AS TREASURER THEREOF	)	
DEFENDANTS	)	

Plaintiff, Investment Entertainment, Inc., for its complaint herein says that:

1. The jurisdiction of this Court is invoked under the Constitution of the United States and the First and Fourteenth Amendments thereto; under Title 42, United States Code, Section

1983, providing that every person who under color of any statute, ordinance, regulation, custom or usage of any State subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by said Constitution shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress; under Title 28, United States Code, Section 1343 (3), conferring upon the United States District Court's original jurisdiction of any civil action authorized by law to be commenced by any person to redress the deprivation under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege of immunity secured by the said Constitution; and under Title 28, United States Code,

Section 2201, providing for the rendition of declaratory judgments by the said courts.

2. Plaintiff is and was at all times hereinafter mentioned a corporation organized and existing under the laws of the State of Tennessee, and is and was at all times hereinafter mentioned duly authorized under the laws of the State of Kentucky to transact business in said latter State. At all times hereinafter mentioned, plaintiff owned and operated, and now owns and operates, at Paducah, Kentucky, a place of business for the exhibition and/or sale of motion picture films, video tapes, and video cassettes, books, magazines and other materials of like nature, known as "Tammy's Book Store."

3. The defendant City of Paducah is a municipal corporation of the State of Kentucky of the second class,

organized and operating under the city manager form of government. The defendant, John K. Penrod, is the Mayor of said City of Paducah, and the defendants, Joe Viterisi, Robert A. Coleman, Harold (Shorty) Ford and James W. Flynn are its Commissioners, and together said Mayor and Commissioners constitute the Board of Commissioners, which is the legislative body of said city. The defendant, James W. Utter is Corporation Counsel of said city, and the defendant, Thurman Baker is its Treasurer.

4. On June 14, 1983, the said Board of Commissioners enacted an ordinance designated as Ordinance No. 83-6-2388, a copy of which is annexed to this complaint part thereof as Exhibit "A" thereto; and on July 13, 1983, the defendant, Utter, as Corporation Counsel aforesaid notified plaintiff in writing of the intention of the defendant, City

of Paducah, to institute proceedings against plaintiff under said ordinance. A copy of said notice is annexed to this complaint as part thereof as Exhibit "B" thereto. Thereafter, the date of the hearing before the Board of Commissioners mentioned in said notice was amended to August 3, 1983, and said hearing is to be held on that date.

5. The aforesaid ordinance is unconstitutional, invalid, unenforceable, null and void, both on its face and as applied to plaintiff, as violative of the Constitution of the United States and the First and Fourteenth amendments thereto, and of the rights of the plaintiff under said Constitution and said Amendments, in that the provisions of said ordinance and the enforcement procedures set forth therein constitute an unconstitutional prior restraining upon the exhibition

and distribution of literary and pictorial matter protected therefrom by the First and Fourteenth Amendments to the Constitution of the United States, and a deprivation of plaintiff's rights, liberty and property without due process of law.

6. Unless enjoined and restrained therefrom by this Court, defendants will continue to proceed against plaintiff under the provisions and procedures of said unconstitutional ordinance, will impose unconstitutional prior restraint upon its exhibition and distribution of said protected materials, and will deprive plaintiff of its constitutionally protected rights, liberty and property without due process of law, all in violation of plaintiff's constitutional rights. As a result, plaintiff will suffer immediate and irreparable injury, loss and damage therefrom, to redress which plaintiff

has no adequate remedy at law and therefore seeks equitable relief by way of injunction.

7. An actual controversy within the jurisdiction of this Court exists between plaintiff and defendants, in that plaintiff contends that said ordinance and all provisions thereof and procedures prescribed thereby are invalid, unconstitutional, unenforceable, null and void, both on their face and as applied to plaintiff, whereas defendants contend the contrary.

WHEREFORE, plaintiff demands (1) a declaratory judgment to the effect that said ordinance is unconstitutional and unenforceable; (2) that defendants be permanently and perpetually enjoined and restrained from proceeding against plaintiff under said ordinance or any

provision thereof; and (3) the recovery of its costs.

Joseph S. Freeland
FREELAND, GLANVILLE & MEGIBOW
910 Citizens' Bank Building
Paducah, Kentucky 42001
Attorney for Plaintiff
(502) 442-0121

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH
Civil Action File No. C83-0208-P(J)

INVESTMENT ENTERTAINMENT, INC.	)	
PLAINTIFF	)	
VS.	)	AMENDED COMPLAINT
CITY OF PADUCAH, ET AL.	)	
DEFENDANTS	)	

Plaintiff, Investment Entertainment, Inc., amends its complaint before service of any responsive pleading by any of the defendants, and for amendment adds thereto the following averments:

1. On August 3, 1983, the defendants Penrod, as Mayor, and Viterisi, Coleman, Ford, Flynn, as Commissioners, constituting the Board of Commissioners of the defendant City of Paducah, adopted a resolution of the said Board, a copy of which is annexed

hereto and made a part of this amended complaint as Exhibit "C" thereto.

2. On August 5, 1983, the defendant Utter, as Corporation Counsel of said defendant city, issued and caused to be served upon plaintiff, together with a certified copy of said resolution and a certified copy of the ordinance mentioned in the complaint, a written notice, a copy of which is annexed hereto and made a part of this amended complaint as Exhibit "D" thereto.

3. Unless enjoined and restrained therefrom by this Court, the defendants will proceed to carry said resolution into effect, and to enforce its provisions against plaintiff in violation and deprivation of plaintiff's rights under the Constitution of the United States and the First and Fourteenth Amendments thereto.

4. The said resolution is unconstitutional, invald, enforceable, null and void, both on its face and as applied to plaintiff, as violative of the Constitution of the United States and the First and Fourteenth Amendments thereto, and of the rights of the plaintiff under said Constitution and said Amendments, in the following respects:

(a) The provisions thereof and the procedures set forth therein constitute unconstitutional prior restraint upon the exhibition and distribution of literary and pictorial matter protected therefrom by said constitution and said Amendments.

(b) The finding of the Board of Commissioners that the video tapes and magazines referred to in said resolution are obscene is not supported by evidence.

(c) The finding of the Board of Commissioners, based upon viewing two video tapes and perusing two magazines, that plaintiff's business is a public nuisance and that all materials obssessed by it constitute a public nuisance, is not supported by evidence, and is irrational.

(d) The attempted revocation of plaintiff's business licenses, the attempted imposition of costs, the attempted imposition of a lien against plaintiff's property, and the attempts forfeiture of plaintiff's business receipts, all as provided by the provisions of said resolution, constitute a deprivation of plaintiff's property without due process of law.

5. The attempted enforcement of the provisions of said resolution against plaintiff by defendants threatens plaintiff with immediate and

irreparable injury, loss and damage therefrom, to redress which plaintiff has no adequate remedy at law and therefore seeks equitable relief by way of injunction.

6. An actual controversy within the jurisidction of this Court exists between plaintiff and defendants, in that plaintiff contends that said resolution and all provisions thereof and procedures prescribed thereby are unconstitutional, invalid, unenforceable, null and void, both on their face and as applied to plaintiff, whereas defendants contend the contrary.

WHEREFORE, plaintiff demands (1) a declaratory judgment to the effect that said resolution is unconstitutional and unenforceable; (2) that defendants be permanently and perpetually enjoined and restrained from proceeding against plaintiff under said resolution or any

provision thereof; (3) the relief demanded by its original complaint; and (4) the recovery of its costs.

Joseph S. Freeland
FREELAND, GLANVILLE & MEGIBOW
910 Citizens' Bank Building
Paducah, Kentucky 42001
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on August 10, 1983, I mailed a copy of the foregoing amended complaint and annexed exhibits to each of the following named defendants at their respective last known addresses: City of Paducah, P.O. Box 2267, Paducah, Kentucky 42001; John K. Penrod, 814 Bellevue Drive, Paducah, Kentucky 42001; Joe Viterisi, 950 Park Avenue, Paducah, Kentucky 42001; Robert A. Coleman, 639 North 23rd Street, Paducah, Kentucky 42110; Harold Ford, 195 Idlewild Drive, Paducah, Kentucky

42001; James W. Flynn, 1118 Jefferson Street, Paducah, Kentucky 42001; James W. Utter, P.O. Box 2267, Paducah, Kentucky 42001; and Thurman Baker, P.O.Box 2267, Paducah, Kentucky 42001.

Attorney for Plaintiff

APPENDIX "F"

Complaint and Petition for Temporary and Permanent Injunction filed by the City of Paducah on August 10, 1986 in the McCracken Circuit Court.

(Reference: Petition for Writ of Certiorari at page 16, line 9).

....F-1 thru F-12

McCRACKEN CIRCUIT COURT
CIVIL ACTION NO. 83-CI-
DIVISION NO.

CITY OF PADUCAH	)	
	)	
PLAINTIFF,	)	COMPLAINT
	)	AND PET-
VS.	)	ITION FOR
	)	TEMPORARY
INVESTMENT ENTERTAINMENT,	)	AND PER-
INC. Serve: James L.	)	MANENT
Lindblad, Citizens Bank	)	INJUNCT-
Building, Paducah,	)	ION
KY 42001, Statutory Agent	)	
	)	
DEFENDANT.	)	

Comes the City of Paducah and for its complaint and petition for temporary and permanent injunction against the defendant states as follows:

1. The plaintiff, City of Paducah, is a city of the second class, possessing all powers conferred upon cities of the second class by the statutes of the Commonwealth of Kentucky and under the general powers of city of the second class under the statutes of the Commonwealth of Kentucky, the City

of Paducah has the power to declare the existence of public nuisances within the City of Paducah.

2. The defendant, Investment Entertainment, Inc., is a corporation which is incorporated under the laws of the Commonwealth of Kentucky with its principle place of business being Citizens Bank Building, Paducah, Kentucky.

3. Investment Entertainment, Inc., is the owner of real estate known as 243 Brown Street, Paducah, Kentucky, more particularly described as follows:

> Beginning on the south side of Brown Street at a tack a distance of 94.32 feet in a westerly direction from a southwest intersection of Brown Street and Beltline Highway (now Irvin Cobb Drive); thence at a right angle in a southerly direction a distance of 125 feet to an iron pipe; thence at a right angle in a westerly direction a distance of 50 feet to an iron rod; thence at a right angle in a northerly direction a distance of 125 feet to an iron rod on the south line of Brown Street;

thence with the south line of Brown Street at a right angle a distance of 50 feet in an easterly direction to the point of beginning.

Being the same property in all respects that was conveyed to Investment Entertainment, Inc. by deed dated the 21st day of March, 1983, and recorded in Deed Book 653, Page 239, in the McCracken County Court Clerk's Office.

4. The defendant, Investment Entertainment, Inc., operates a business at 243 Brown Street, Paducah, Kentucky, known as Tammy's Book Store.

5. On April 8, 1983, Investment Entertainment, Inc., David Capps, president, applied for and received a 1983 business license for retail sales within the City of Paducah.

6. On April 8, 1983, Investment Entertainment, Inc., David Capps, president, applied for and received a business license for an amusement business at 243 Brown Street, Paducah, Kentucky, known as Tammy's Book Store.

7. On June 14, 1983, the Board of Commissioners adopted Ordinance No. 83-6-2388 which declares the commercial exploitation of obscene motion picture films (as defined in the ordinance) and obscene publications to be contrary to the public health, safety and general welfare and a public nuisance, and declaring a place displaying or exhibiting such obscene motion picture films or publications to be a public nuisance per se; making all obscene matter and publications in such place a public nuisance per se; providing for notice and legal proceedings to abate the same and providing a procedure for assessment and the collection of costs of abatement. A copy of said ordinance is attached hereto and made a part hereof as if set out in full. (See exhibit A.)

8. On the 22nd day of June, 1983, a police officer of the City of Paducah visited the business known as Tammy's Book Store, which is operated by Investment Entertainment, Inc. located at 243 Brown Street, Paducah, Kentucky, and observed the display for sale of materials which appeared to the officer to be in violation of the Ordinance No. 83-6-2388 of the City of Paducah, declaring it a public nuisance to engage in the commercial exploitation of obscene motion picture films and obscene publications as defined in that ordinance.

9. On July 2, 1983, the same officer of the City of Paducah returned to the place of business known as Tammy's Book Store located at 243 Brown Street, Paducah, Kentucky, and purchased a video tape entitled "EROTIC INTERLUDE" and a magazine entitled "BACK DOOR NUMBER TWO".

10. On July 10, 1983, the same officer returned to Tammy's Book store at the above address, and again purchased a video tape entitled, "THE FILTHY RICH" and a magazine entitled, "MR/MRS".

11. On August 3, 1983, the Board of Commissioners of the City of Paducah conducted a hearing, pursuant to the ordinance, 83-6-2388, and after reviewing the magazines in their entirety and the video tapes, "EROTIC INTERLUDE" and "THE FILTHY RICH", in their entirety, adopted a Resolution which is attached hereto and made a part hereof as if set out in full as exhibit B hereto.

12. Said Resolution pursuant to the above referenced ordinance, found that the business known as Tammy's Book Store and operated by Investment Entertainment, Inc., to be a public

nuisance and the commercial exploitation of obscene material and ordered the revocation of all licenses and permits issued by the City of Paducah to Tammy's Book Store and/or Investment Entertainment, Inc., subject to confirmation by McCracken Circuit Court in a judicial proceeding to be filed therein.

13. Pursuant to Ordinance 83-6-2388, particularly Section 19-154, on August 5, 1983, the corporation statutory agent, their attorney, their general manager or person in charge of the premises and all employees thereof were served with a copy of the Ordinance No. 83-6-2388, the Resolution adopted by the Board of Commissioners on August 3, 1983, and a letter from the Corporation Counsel of the City of Paducah advising them of findings of the Board of Commissioners and the effect of said

ordinance and resolution, a copy of which said letter is attached hereto as exhibit C.

14. Section 19-153 of Ordinance 83-6-2388, declares the following to be nuisances per se:

(A) Any and every place of business in the City of Paducah in which obscene publications constitute all of the stock in trade, or a principal part thereof. Where such obscene publications constitute only a part of the stock in trade and are located in a place or places within such business which are capable of demarcation, such place or places constitute the public nuisance which requires abatement; and

(B) Any and every obscene publication possessed at a place which is a public nuisance under this Section.

From and after service on the place, or its manager, or acting

manager, or person then in charge of such place, of a certified copy of this ordinance and a certified copy of the resolution provided for herein, all valuable consideration received for the sale of such obscene publications shall be regarded as being a public nuisance per accidens, as personal property used in conducting and maintaining a declared public nuisance, as to which forfeiture will be requested in the judicial proceedings required herein.

WHEREFORE, the City of Paducah demands that the Court find that the subject matter identified by the Board of Commissioners in said Resolution is obscene as defined within Ordinance 83-6-2388, that each place named by the Board of Commissioners is a public nuisance and that the action taken by the Board of Commissioners to revoke the licenses issued to that place of

business was unlawful; enter an injunction both temporary and permanent, restraining all persons maintaining said nuisance from possessing or publicly exhibited said obscene motion picture films, as defined in the ordinance, or from selling or possessing for sale said obscene publications at any time in the future in the City of Paducah, and such other injunctive relief as the court may order; and order that all positive prints of said obscene films and all said obscene publication or copies or reproductions thereof, be forfeited as contraband, order an accounting of all monies paid as admission price to the exhibition or exhibitions of said obscene motion picture films (as defined within said ordinance) and valuable consideration received for the sale of such obscene publication from and after 10:00 o'clock a.m. August 5, 1983, at

which time the person or persons maintained of said nuisance received a copy of the Resolution of the Board of Commissioners finding that a public nuisance existed and grant to the City of Paducah a judgment that such monies are again derived from wrongful acts and a public nuisance; order that all admission price monies or valuable consideration received and any money in the court order accounting, be forfeitured as required by law to the City of Paducah; grant to the City of Paducah, a judgment for all costs expended in abating the public nuisance including investigation costs, court

costs, reasonable attorneys fees, and such other expenses provided for herein and all relief to which the court may deem proper.

James W. Utter
Attorney at Law
P.O. Box 2267-
City Hall
Paducah, KY 42001

ATTORNEY FOR
DEFENDANT

APPENDIX "G"

Answer of the City of Paducah to Complaint in the United States District Court For The Western District Of Kentucky at Paducah, entitled "Investment Entertainment, Inc. v. City of Paducah, et al.," Civil Action File No. C83-0208P(J).

(Reference: Petition for Writ of Certiorari at page 4, line 3; page 16, line 20; page 45, line 1.

....G-1 thru G-5

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH
CIVIL ACTION FILE NO. 83-0208-P(J)

INVESTMENT ENTERTAINMENT, INC.	)	
	)	
PLAINTIFF,	)	ANSWER
	)	
VS.	)	
	)	
CITY OF PADUCAH, ET AL	)	
	)	
DEFENDANT.	)	

Come the defendants and for their answer to the complaint state as follows:

FIRST DEFENSE

The complaint and amended complaint fail to state a claim upon which relief can be granted.

SECOND DEFENSE

As to the complaint, the defendants admit the allegations contained in paragraphs 1, 2, 3, 4, 7, and so much of paragraph 6 which states that "unless enjoined and restrained therefrom by this court, the defendants will continue

to proceed against the plaintiff under the provisions and procedures of said ordinance". Defendants deny the allegations contained in paragraph 5, the remaining allegations in paragraph 6 including the unconstitutionality of the ordinance: the defendants deny each and every other allegation of the complaint not specifically admitted.

THIRD DEFENSE

As to the amended complaint, the defendants admit the allegations contained in paragraphs 1, 2, 6, and so much of paragraph 3 which states that the defendants will carry said resolution into effect and enforce its provisions against plaintiff: defendants deny the remaining allegations in paragraph 3, paragraph 4 in its entirety, and paragraph 6: defendants deny each and every other allegation of the amended complaint not

specifically admitted herein.

FOURTH DEFENSE

There is presently pending in McCracken Circuit Court, Civil Action No. 83-CI-590, styled City of Paducah vs. Investment Entertainment, Inc. and in which suit the state courts will make a determination of the law applicable on the subject matter of this suit pending in Federal District Court, and the Federal District Court should abstain from further proceeding in this action until a final determination is made on the merits and the action filed in the McCracken Circuit Court.

FIFTH DEFENSE

The Ordinance, No. 83-6-2388, attached as exhibit "A" to the complaint is constitutional in its entirety and is applied to this defendant in that no prior restraint exist under the ordinance, and a court review of the

material is required before any licenses would be revoked by the city of Paducah, and all hearings by the Board of Commissioners of the City of Paducah and court proceedings under said ordinance only apply to an existing business which deals in obscenity as defined by said ordinance, which definition substantially complies with the permissible regulations under the first amendment to the constitution of the United States.

WHEREFORE, the defendants demand that the complaint and amended complaint against them be dismissed, that they recover their costs herein expended and all other relief to which they may appear entitled.

James W. Utter
Corporation Counsel
P.O. Box 2267
Paducah, KY 42001
ATTORNEY FOR
DEFENDANTS

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was mailed, postage prepaid, on this 15th day of August, 1983, to: Hon. Joseph S. Freeland, Freeland, Glanville & Megibow, 910 Citizens Bank Building, Paducah, KY 42001, attorney for Investment Entertainment, Inc.

James W. Utter

APPENDIX "H"

1. Motion for Summary Judgment of Investment Entertainment, Inc. in Civil Action No. C83-0208P(J) filed February 2, 1984.

(Reference: Petition for Writ of Certiorari at page 18, line 18).

....H-1 thru H-5

2. Motion for Summary Judgment of City of Paducah in Civil Action No. C83-0217P(J) consolidated with No. 83-0208P(J), filed March 9, 1984.

....H-6 thru H-8

3. Motion for Summary Judgment of Beltline News and Arcade Club, Inc., in Civil Action No. C83-0237-P(J), filed Feb. 1, 1984.

....H-9 thru H-14

4. Motion for Summary Judgment of City of Paducah in Civil Action No. C83-0237P(J), filed March 9, 1984.

....H-15 thru H-16

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH
Civil Action File No. C83-0208-P(J)

INVESTMENT ENTERTAINMENT, INC.	)
	)
PLAINTIFF,	) MOTION
	) FOR
VS.	) SUMMARY
	) JUDG-
CITY OF PADUCAH, ET AL.	) MENT
	)
DEFENDANTS.	)

Plaintiff, Investment Entertainment, Inc., moves the Court for the entry of a summary judgment for the relief demanded in its complaint and amended complaint, upon the ground that the pleadings (including the exhibits thereto) and the annexed affidavit (including the exhibit thereto) show that there is no genuine issue as to any

material fact, and that plaintiff is entitled to such judgment as a matter of law.

Joseph S. Freeland
FREELAND, GLANVILLE & MEGIBOW
910 Citizens' Bank Building
Paducah, KY 42001
Attorney for Plaintiff
(502) 442-0121

AFFIDAVIT

STATE OF KENTUCKY)
) Sct.
COUNTY OF McCRACKEN)

The affiant, Joseph S. Freeland, being duly sworn, deposes upon oath as follows:

1. Affiant is 68 years of age, is and has been continuously for the past 45 years a regularly licensed and practicing attorney at law at Paducah, Kentucky, is the attorney for the plaintiff, Investment Entertainment,

Inc., in this action, and has been plaintiff's counsel continuously since some time in May, 1983.

2. Affiant makes this affidavit on his own personal knowledge, and is competent to testify to the matters stated therein.

3. The pleadings in this action, together with all exhibits thereto, are made a part of this affidavit by reference, to the same extent as if copied in full therein.

4. Affiant personally attended and was present at, and during the entirety of, the hearing conducted by the Board of Commissioners of the defendant City of Paducah on August 3, 1983, at the time of the adoption by said Board of the resolution annexed as Exhibit "C" to plaintiff's amended complaint, and personally saw and heard all that transpired at said hearing.

5. Said hearing was stenographically reported, at the instance of the defendants, by Shirley B. France, a stenographic reporter and Notary Public, who thereafter transcribed here stenographic notes taken at said hearing upon the typewriter. A copy of said transcript of said hearing is annexed hereto and made a part hereof as Exhibit No. 1.

6. Affiant knows of his own personal knowledge that said transcript is a full, correct and complete report of all proceedings had by and before said Board at said hearing of August 3, 1983.

And further affiant sayeth not.

Joseph S. Freeland

Subscribed and sworn to before me by Joseph S. Freeland this 2nd day of February, 1984. My commission as Notary Public will expire August 12, 1987.

_____
Notary Public, State
of Kentucky at Large

CERTIFICATE OF SERVICE

I hereby certify that on February 2, 1984, I mailed a copy of the foregoing motion and affidavit to Hon. James W. Utter, defendants' attorney, at his last known address, P.O. Box 2267, Paducah, Kentucky 42001.

_____
Attorney for
Plaintiff

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CITY OF PADUCAH	)	
	)	
vs.	)	Civil Action
	)	No. 83-0217
INVESTMENT ENTERTAIN-	)	P(J)
MENT, INC. and SHOW-	)	
TIME ENTERTAINMENT,	)	
INC.	)	
	)	
CONSOLIDATED WITH:	)	MOTION FOR
	)	SUMMARY
INVESTMENT ENTERTAIN-	)	JUDGMENT
MENT, INC.	)	
	)	
vs.	)	Civil Action
	)	No. 83-0208
CITY OF PADUCAH, ET	)	P(J)
AL.	)	

Comes the City of Paducah and moves the Court for Judgment pursuant to Rule 56(c) of the Federal Rules of Civil Procedure, in that the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact in that the City of Paducah is entitled to a judgment as a matter of law.

The City of Paducah herein files its Memorandum in Support of said Motion.

James W. Utter
P.O. Box 2267
Paducah, KY 42001

Attorney for
City of Paducah

NOTICE

This Motion is being submitted pursuant to the Order of the Court of February 14, 1984.

James W. Utter

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was mailed to the Hon. Joseph Freeland, Citizens Bank Building, Paducah, KY 42001, attorney for Investment Entertainment, Inc. and Showtime Entertainment, Inc., on this 8th day of March, 1984.

_____

James W. Utter

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH
Civil Action File No. C83-0237-P(J)

BELTLINE NEWS & ARCADE CLUB, INC.	)	
PLAINTIFF,	)	MOTION FOR SUMMARY
VS.	)	JUDGMENT
CITY OF PADUCAH, ET AL	)	
DEFENDANT.	)	

Plaintiff, Beltline News & Arcade Club, Inc., moves the Court for the entry of a summary judgment for the relief demanded in its complaint and amended complaint, upon the ground that the pleadings (including the exhibits thereto) and the annexed affidavit (including the exhibits thereto) show

that there is no genuine issue as to any material fact, and that plaintiff is entitled to such judgment as a matter of law.

Joseph S. Freeland
FREELAND, GLANVILLE & MEGIBOW
910 Citizens' Bank Building
Paducah, KY 42001
Attorney for Plaintiff
(502) 442-0121

AFFIDAVIT

STATE OF KENTUCKY)
) Sct.
COUNTY OF McCRACKEN)

The affiant, Joseph S. Freeland, being duly sworn, deposes upon oath as follows:

1. Affiant is 68 years of age, is and has been continuously for the past 45 years a regularly licensed and practicing attorney at law at Paducah,

Kentucky, is the attorney for the plaintiff, Beltline News & Arcade Club, Inc., and has been plaintiff's counsel and registered process agent continuously since plaintiff was organized as a non-stock, non-profit corporation under the laws of the State of Kentucky in April, 1982.

2. Affiant makes this affidavit on his own personal knowledge, and is competent to testify to the matters stated therein.

3. A certified copy of plaintiff's articles of incorporation is annexed hereto as Exhibit No.1, and is made a part hereof.

4. The pleadings is this action, together with all exhibits thereto, are made a part of this affidavit by reference, to the same extent as if copied in full herein.

5. Affiant personally attended and was present at, and during the entirety of, the hearing conducted by the Board of Commissioners of the defendant City of Paducah on September 2, 1983, at the time of the adoption by said Board of the resolution annexed as Exhibit "C" to plaintiff's amended complaint, and personally saw and heard all that transpired at said hearing.

6. Said hearing was stenographically reported, at the instance of the defendants, by Lisa A. Kellough (now Lisa A. Dapp), who was and is the official stenographic reporter for Division No. 2 of the McCracken Circuit Court, and who thereafter transcribed her stenographic notes taken at said hearing upon the typewriter. A copy of said transcript of said hearing is annexed hereto and made a part hereof as Exhibit No. 2.

7. Affiant knows of his own personal knowledge that said transcript is a full, correct and complete report of all proceedings had by and before said Board at said hearing of September 2, 1983.

And further affiant sayeth not.

Joseph S. Freeland

Subscribed and sworn to before me by Joseph S. Freeland this 1st day of February, 1984. My commission as Notary Public will expire August 12, 1987.

Notary Public, State
of Kentucky at Large

Certificate of Service

I hereby certify that on February 1, 1984, I mailed a copy of the foregoing motion and affidavit to Hon. James W. Utter, defendants' attorney, at his last known address, P.O. Box 2267, Paducah, Kentucky 42001

_____
Attorney for
Plaintiff

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

BELTLINE NEWS & ARCADE CLUB, INC.	) MOTION FOR SUMMARY
PLAINTIFF,	) JUDGMENT
VS.	) Civil Action No. 83-0237
CITY OF PADUCAH	) P(J)
DEFENDANTS.	)

Comes the City of Paducah and moves the Court for Judgment pursuant to Rule 56(c) of the Federal Rules of Civil Procedure, in that the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact in that the City of Paducah is entitled to a judgment as a matter of law.

The City of Paducah herein files its Memorandum in Support of said Motion.

James W. Utter
P.O. Box 2267
Paducah, KY 42001

Attorney for
City of Paducah

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was mailed to the Hon. Joseph Freeland, Citizens Bank Building, Paducah, KY 42001, attorney for Beltline News & Arcade Club, Inc., on this 8th day of March, 1984.

James W. Utter

86-307 (2)

Supreme Court, U.S.
FILED
SEP 25 1986
JOSEPH F. SPANIOL, JR.
CLERK

NO. 86-

IN THE

Supreme Court of the United States

October Term, 1986

CITY OF PADUCAH: JOHN K. PENROD, as Mayor, and JOE VITERISI, ROBERT A. COLEMAN, HAROLD (SHORTY) FORD and JAMES W. FLYNN, as Commissioners of said City: JAMES W. UTTER, as Corporation Counsel, and THURMAN BAKER, as Treasurer thereof,

Petitioners,

v.

INVESTMENT ENTERTAINMENT, INC.;
BELTLINE NEWS AND ARCADE CLUB,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JOSEPH S. FREELAND
JAMES U. GLANVILLE
Freeland, Glanville & Megibow
910 Citizens Bank Bldg.
Paducah, KY 42001
502-442-0121

Counsel of Record
for Respondents

203 PP

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1986

CITY OF PADUCAH: JOHN K. PENROD, as Mayor , and JOE VITERISI, ROBERT A. COLEMAN, HAROLD (SHORTY) FORD and JAMES W. FLYNN, as Commissioners of said City: JAMES W. UTTER, as Corporation Counsel, and THURMAN BAKER, as Treasurer thereof.

Petitioners,

v.

INVESTMENT ENTERTAINMENT, INC.;
BELTLINE NEWS AND ARCADE CLUB,

Respondents

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Respondents, Investment Entertainment, Inc., and Beltline News and Arcade Club, respectfully submit that the Petition for Writ of Certiorari to review the Opinion sub judica of the Circuit Court of Appeals for the Sixth Circuit in the subject cases, to-wit: No. C83-0217-P(J) City of Paducah v. Investment Entertainment, Inc. removed from McCracken (County, Kentucky) Circuit Court and civil rights actions

Investment Entertainment, Inc. No. 85-5092 and Beltline News and Arcade Club, No. 85-5093 v. City of Paducah, et al, entered on May 28, 1986, should be denied.

JURISDICTION

Petitioners' recitation of the proceedings in the District Court and Court of Appeals for the Sixth Circuit is substantially correct except:

The cited case of State of Idaho ex rel. Kidwell v. U.S. Marketing, 102 Idaho 431, 631 P.2d 622 (1981), appears to be in conflict with the opinion of the Court of Appeals filed herein on May 28, 1986. However, this jurisdictional ground urged by Petitioners for granting the Writ is attenuated by Kentucky's own interpretation of a similar ordinance in Hall v. Commonwealth ex rel. Shroering, Ky. 505 S.W.2d 166 (1974) rendered by Kentucky's court of last resort. Hall, supra, placed narrower limits upon the injunctive relief available to regulate pornography than does Idaho in State of Idaho, supra.

And, Arcara, District Attorney of Erie County v. Cloud Books, Inc., etc., ___U.S.___, 54 L.W. 5060, 106 S.Ct. 3172 (1986) cited by the Petitioners is not dis-

positive of any issue raised in the Petition for Writ of Certiorari. (Houses of prostitution as such may be shut down though also containing a bookstore.).

CITY ORDINANCE INVOLVED

The subject ordinance of the City of Paducah, as well as all other references used by Petitioners, is likewise referenced in the Appendix to this brief, as well as two additional documents, to-wit: Memorandum in Support of City of Paducah Motion for Summary Judgment (Appendix "I") and Brief for City of Paducah, et al filed in the Court of Appeals for the Sixth Circuit (Appendix "J").

STATEMENT OF THE CASE

On June 14, 1983 the Petitioner, City of Paducah, acting through its commissioners and mayor (who are also nominal parties to this suit) enacted the subject ordinance set forth in Appendix "C". On August 3, 1983, following a public hearing, Paducah adopted a resolution that suit be filed, pursuant to said ordinance, against the Respondents in McCracken Circuit Court. One of these suits, that one naming Investment Entertainment, Inc., was successfully removed to Federal District Court upon grounds of diversity of cit-

izenship. The other remains pending in State Court. Both Beltline and Investment, Respondents to the instant Motion, filed suits against Paducah, et al pursuant to 42 U.S.C. § 1983.

In response to the federal suits, Paducah and the other movants pleaded a number of defenses including abstention. Thereafter all parties, including Paducah, moved for Summary Judgment. In its Motion and supporting Memorandum, (Appendix "I"), Paducah sought only a judgment on the merits of its claim that the subject ordinance was constitutional. The District Court was not asked to address the question of whether abstention was appropriate nor whether the ordinance should be construed initially by a State Court. Paducah lost and Beltine and Investment won in the District Court, and a permanent injunction was entered against Paducah on First Amendment grounds, the only grounds presented. Paducah appealed.

In seeking relief on appeal before the Court of Appeals for the Sixth Circuit, Paducah's sole ground urged for reversal was the Constitutional validity of the ordinance. Again, Paducah was silent on the issues of abstention or construction of the subject ordinance

by State Courts.

The Court of Appeals affirmed the District Court's holding that the subject ordinance, on its face, establishes a prior restraint of protected speech. Paducah now seeks a Writ of Certiorari from this Court.

ARGUMENT I

PADUCAH HAS WAIVED THE DEFENSE OF ABSTENTION

Paducah is asking this Court for relief under the abstention doctrine. In effect, this Court is being asked to consider a case almost completely different from that presented to the District Court or Court of Appeals. It is fundamental that defenses may not be raised for the first time on appeal. E.g. United States v. Estate of Donnelly, 397 U.S. 286 (1970). Moreover, it is difficult to apprehend just how a State Court's construction of the statute might differ from the one given by the District Court. Although Paducah argues vigorously for the principle of State Court construction, the only specific point on which it claims a potential construction contrary to the one given below, is the possible severability

of the license revocation provision. (Petition p. 52-53). Paducah does not say how this would render the balance of the ordinance valid and it is difficult to see how it could be.

For reasons stated hereinafter, it is unlikely that Kentucky's construction of the ordinance would differ from that of the District Court.

ARGUMENT II

THE DISTRICT COURT AND COURT OF APPEALS CORRECTLY HELD THE PADUCAH ORDINANCE ESTABLISHES A PRIOR RESTRAINT ON PROTECTED SPEECH

The main thrust of Paducah's argument before the Court of Appeals (Appendix "I") was that the sanctions for violating the ordinance were less onerous than for violating Kentucky's penal statutes proscribing dissemination of obscenity (KRS 531.020) which could include incarceration. Penal statutes against pornography do not, of course, restrict the dissemination of protected materials. Miller v. California, 413 U.S. 15 (1973).

Although it was not argued in the Court of Appeals as a reason for affirmance (abstention having not been raised) there is an additional reason for affirming the judgment below. California Bankers Ass'n. v.

Shultz, 416 U.S. 21 (1974). That is, Kentucky's court of last resort (the former Court of Appeals) had already placed a narrow construction on similar efforts to enjoin the dissemination of pornography in the City of Louisville. Hall v. Com. ex rel. Shroering, Ky 505 S.W.2d 166 (1974). In Hall, supra it was held that the defendants d/b/a "Adult News" could be enjoined from violating obscenity statutes and punished for contempt. However, the trial court's order was overbroad in ordering that defendants be permanently enjoined from selling, drawing, giving away, etc. at any location in city or county, any film or any written or printed material.

CONCLUSION

For the reasons and upon the authorities cited hereinabove, Respondents respectfully move that the Petition for Writ of Certiorari be denied.

CERTIFICATE OF SERVICE

I, hereby certify that on this 25th day of September, 1986, the original and 40 copies of the within Response to Petition for Writ of Certiorari were deposited in the United States Post Office in Paducah, Kentucky, postage prepaid, and properly addressed to the Clerk of the United States Supreme Court.

I further certify that three (3) copies were also mailed, postage prepaied, to the below-listed parties to the proceedings and that all parties required to be served have been served.

Hon. James W. Utter
P.O. Box 2267
Paducah, KY 42002-2267

Hon. James J. Clancy
9055 La Tuna Canyon Rd.
Sun Valley, CA 91352

Attorneys for Petitioners

Hon. Edward Cooper
Santa Ana City Attorney
20 Civic Center Plaza
Santa Ana, CA 92701

Counsel for Amicus Curiae

Attorney for Respondents

APPENDIX "A"

Opinion of the United States Court of Appeals for the Sixth Circuit in City of Paducah v. Investment Entertainment, Inc., et al., and Investment Entertainment, Inc., (No. 85-5092) Beltline News and Arcade Club, (No. 85-5903) v. City of Paducah et al., Nos. 85-5092, 85-5093 decided May 28, 1986.

(Reference: Petition for Writ of Certiorari at page 2, line 15; page 20, line 19; page 21, line 16).

....A-1 thru A-40

Nos. 85-5092, 85-5093

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

CITY OF PADUCAH, Plaintiff-Appellant, v. INVESTMENT ENTERTAINMENT, INC., et al., Defendants-Appellees.	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY
INVESTMENT ENTERTAINMENT, INC., (NO. 85-5092). BELTLINE NEWS AND ARCADE CLUB, (NO. 85-5093). Plaintiffs-Appellees. v. CITY OF PADUCAH, et al., Defendants-Appellants.	

Decided and Filed May 28, 1986

Before: MERRITT and WELLFORD, Circuit Judges; and CELEBREZZE, Senior Circuit Judge.

MERRITT, Circuit Judge, delivered the opinion of the court in which CELEBREZZE, Senior Circuit Judge, joined. WELLFORD, Circuit Judge (pp. 16-18), delivered a separate concurring opinion.

MERRITT, Circuit Judge. The City of Paducah, Kentucky, appeals the judgment of District Judge Johnstone that Paducah's obscenity abatement ordinance, on its face, establishes a prior restraint of protected speech and thereby unconstitutionally infringes the first amendment rights of plaintiffs Investment Entertainment, Inc. and Beltline News and Arcade Club, sellers of books, magazines, and video tapes. We agree that the ordinance's provision requiring the revocation of the occupational licenses of booksellers and move theatres dealing in obscenity renders the ordinance invalid.

I.

On June 14, 1983, the City of Paducah enacted an ordinance to control obscene material as defined in Miller v. California, 413 U.S. 15 (1973). Relying on the city's power to declare and abate public nuisances, the ordinance defines the following as "public nuisances per se" in Paducah: (1) any place where obscene films are publicly exhibited or possessed for exhibition in the regular course of business; (2) any obscene film so exhibited or possessed; (3) any place of business, or portion thereof, where obscene publications constitute a principal part of the stock in trade of the business; and (4) any obscene publication possessed at such a place. The ordinance also defines as "a public nuisance per accidens" all money or other consideration received for the exhibition or sale of such obscene films

or publications after the manager of the business receives certified notice of the initiation of proceedings under the ordinance.

The key contested provision of the ordinance states that the Paducah Board of Commissioners, upon a specific finding that a public nuisance exists, shall by resolution order a revocation of all licenses and permits that have been issued to the business maintaining the nuisance. This license revocation is subject to judicial confirmation.

The Board must then order counsel for the city to bring a civil action against the public nuisance. In addition to license revocation, the ordinance contemplates that the action will seek an order enjoining all persons maintaining the nuisance from possessing or marketing the obscene films or publications at any time in the future,

an accounting of all money received in the obscenity business, forfeiture of the obscene materials and the money, and judgment for the city for all costs expended in abating the nuisance. The ordinance provides that the "cost of abatement," which is defined to include investigative costs, court costs, reasonable attorney fees, and printing costs for any trial and appeal, is to be a special assessment against the parcel of land upon which the public nuisance is maintained, but only against the interests of the individuals responsible for maintaining the nuisance. This special assessment is to be collected and enforced by the same means as used for ordinary local property taxes.

In June and July of 1983, Paducah police officers purchased obscene magazines and video tapes from businesses operated in Paducah by

Investment and Beltline. Counsel for the city wrote a letter to both informing them of the ordinance and of the material purchased by the police officers. The letter gave them notice that public hearings would be held. In August 1983, after a hearing, the Board adopted a resolution finding the material purchased from Investment to be obscene and declaring the business from which the material was purchased to be a public nuisance. In September 1983, the Board adopted a similar resolution concerning Beltline. Thereafter, counsel for the city initiated civil actions in Kentucky state court seeking abatement of the nuisances as provided by the ordinance.

Investment and Beltline brought separate suits in the United States District Court for the Western District of Kentucky, both under 42 U.S.C. § 1983

(1982), seeking to have the ordinance declared constitutionally invalid and to have the city enjoined from enforcing the ordinance. Alleging diversity of citizenship, Investment removed the state court enforcement action pending against it to federal district court. Beltline also attempted to remove the enforcement action directed against it to federal court, but removal was denied because there was no diversity of citizenship. The District Court then consolidated all three actions. The parties have raised no issue concerning abstention in the District Court or this Court.

Neither Investment nor Beltline challenged the ordinance's definition of obscenity, and both admit that the material seized is obscene within the Miller v. California definition. The District Court granted their motions for

summary judgment. It held that because the ordinance's license revocation procedure could result in closing down an entire place of business even though not all the material was obscene, the abatement procedure amounted to a prior restraint of both protected speech and unprotected speech. Judge Johnstone gave this example: Under the ordinance, a movie theatre could be closed for repeatedly showing an obscene film on weekends even though the theatre showed "The Ten Commandments," "Snow White," and "Gone With the Wind" on week days. The District Court also held that the ordinance's abatement procedure unconstitutionally encouraged businesses to engage in self-censorship because the threat of having an entire place of business "abated" would induce business operators to avoid questionable, but still protected, films and publications.

The District Court ruled that this self-censorship arises from the ordinance's use of undefined terms such as "regular course of business," "repeatedly," and "principal part." The court held that in this respect the ordinance was vague and would give business operators no notice of what conduct the ordinance reached.

II.

The ordinance requires the revocation of the business licenses of distributors and exhibitors of obscene material. It therefore restrains future speech of the booksellers and theaters whose licenses are revoked--both obscene and decorous speech. The main issue presented is whether Paducah may use license revocation as a tool to control obscenity.

The problem of using licensing to control distribution of printed

expression by booksellers and publishers has a long history. Milton's Areopagitica remains the classic argument against the licensing of speech. Writing in 1644, just after the revolution, in response to a parliamentary law reestablishing the use of licensing to control books, Milton takes as his "task...to show that no...well instituted state, if they valued books at all, did ever use" "this authentic Spanish policy of licensing books." He argues instead that "the timeliest and most effectual remedy" is subsequent evaluation and seizure if necessary. Among his many arguments, Milton advances the danger to truth and beauty because they are difficult to distinguish from falsity and ugliness (however "much we thus expel of sin, so much we expel of virtue, for the matter of them both is the same") and the

problem of the "quality which ought to be in every licenser" ("he who is made judge to sit upon the birth and death of books...had need to be a man above the common measure, both studious, learned, and judicious." Yet, "there cannot be a more tedious and unchosen journeywork...than to be made the perpetual reader of unchosen books and pamphlets"). Licensing speech discourages new ideas ("I found and visited the famous Galileo, grown old, a prisoner to the Inquisition, for thinking in astronomy otherwise than the Franciscan and Dominican licensers thought"); undermines expression as a value in itself ("[g]ive me the liberty to know, to utter, and to argue freely according to conscience, above all liberties"); and raises the prospect of manipulation and misinformation when we "pretend to bind books to their good

behavior" ("for what magistrate may not be misinformed, and much the sooner, if liberty of printing be reduced into the power of a few?").

By the late Eighteenth Century, Milton's view against licensing had become the English common law rule against prior restraint, as reflected in Blackstone's Commentaries:

> The liberty of the press is indeed essential to the nature of a free state: but this consists in laying no previous restraints upon publications....To subject the press to the restrictive power of a licenser, as was formerly done, both before and since the revolution, is to subject all freedom of sentiment to the prejudices of one man, and make him the arbitrary and infallible judge of all controverted points of learning, religion, and government.[1]

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[1] 4 W. Blackstone, Commentaries *151-52 (emphasis in original). Blackstone described the history of printer licensing in England:

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The British common law against licensing publishers and booksellers was part of the foundation for the first amendment's guarantee of freedom of the press. See Z. Chafee, Free Speech in the United States 10-12 (1942) (arguing that the Blackstonian view of freedom of the press--freedom from prior restraint--was part, but only part, of the freedom that the first amendment had come to guarantee).

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The art of printing, soon after it's introduction, was looked upon (as well in England as in other countries) as merely a matter of state, and subject to the coercion of the crown. It was therefore regulated with us by the king's proclamations, prohibitions, charters of privilege and of licence, and finally by the decrees of the court of starchamber; which limited the number of printers, and of presses which each should employ, and prohibited new publications unless previously approved by proper licensers. On the demolition of this odious jurisdiction in 1641, the long parliament of Charles I, after

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III.

Modern first amendment jurisprudence has followed Milton and Blackstone on prior restraint. As the District Court noted, that law has dealt with the licensing problem by

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their rupture with that prince, assumed the same powers as the starchamber exercised with respect to the licensing of books; and in 1643, 1647, 1649, and 1652, (Scobell. i. 44, 134, ii. 88, 230.) issued their ordinances for that purpose, founded principally on the starchamber decree of 1637. In 1662 was passed the statute 13 & 14 Car. II. c. 33. which (with some few alterations) was copied from the parliamentary ordinances. This act expired in 1679, but was revived by statute I. Jac. II. c. 17, and continued till 1692. It was then continued for two years longer by statute 4 W. & M. c. 24, but, though frequent attempts were made by the government to revive it, in the subsequent part of that reign, (Com. Journ. 11 Feb. 1694, 26 Nov. 1695. 22 Oct. 1696. 9 Feb. 1697, 31 Jan. 1698.) yet the parliament resisted it so strongly, that it finally expired, and the press became properly free, in 1694; and has ever since so continued.

Id. at *152 n.2.

focusing on whether the use of licensing constitutes a prior restraint of protected expression. The major case on prior restraint is Near v. Minnesota, 283 U.S. 697 (1931). In Near the Court invalidated, as a prior restraint, an injunction entered against a newspaper under a Minnesota statute providing that any newspaper publishing malicious, scandalous, or defamatory material is a nuisance and can be permanently enjoined. Chief Justice Hughes, quoting Blackstone, pointed out that part of the first amendment grew out of the struggle in Britain against the "legislative power of the licenser" of the press. Id. at 713-14. The Court held that if "the object of the statute is not punishment, in the ordinary sense, but suppression of the offending newspaper or periodical" in the future, and "the statute not only operates to suppress

the offending newspaper or periodical but to put the publisher under an effective censorship." 283 U.S. at 709-12, then the statute constitutes a prior restraint.

The City of Paducah's argument that its licensing ordinance is not a prior restraint is similar to Justice Butler's argument for the four dissenters in Near, Paducah, one might argue, is only revoking a previously issued business license, and when the licenses are issued they are completely unrelated to the regulation of speech. Later revocation is for abuse of the occupational license.

Likewise, Justice Butler argued that prior restraint consists of licensing publishers and their books as an original matter, not of later revocation for abuse of the right. Later revocation "does not operate as a

previous restraint on publication within the proper meaning of that phrase" because it "is only in respect of continuing to do what has been duly adjudged to constitute a nuisance." Id. at 735 (emphasis in original). "It is fanciful to suggest similarity between...the decree...to prevent further publication of malicious, scandalous, and defamatory articles and the previous restraint upon the press by licensers as referred to by Blackstone...." Id. at 736 (emphasis in original). Chief Justice Hughes and the majority of the Court rejected this argument--"that the constitutional freedom from previous restraint is lost because charges are made of derelictions which constitute crimes"--dereliction because "[the argument] is inconsistent with the reason which underlies the privilege." Id. at 720-21.

Several federal and state courts have addressed the first amendment question presented by state laws and local ordinances that use the nuisance abatement power to control obscenity. Laws on this subject differ in approach. Some, as in the instant case, abate the nuisance by revoking the offending business' general business license. Others, the so-called "padlock" laws, call for a judicially ordered temporary or permanent injunction under which local authorities close the place of business and do not allow its owners to operate out of that location for the duration of the injunction.

We have found no precedent in which courts have upheld an obscenity law that provided for the revocation of obscenity dealers' business licenses. In at least three instances, federal courts have held local obscenity ordinances that use

the revocation of licenses and permits to be unconstitutional prior restraints of protected speech. Gayety Theatres, Inc. v. Miami, 719 F.2d 1550 (11th Cir. 1983); Entertainment Concepts, Inc. III v. Maciejewski, 631 F.2d 497 (7th Cir. 1980); cert. denied, 450 U.S. 919 (1981); Cornflower Entertainment, Inc. v. Salt Lake City Corp., 485 F.Supp. 777 (D. Utah 1980); see also Genusa v. City of Peoria, 619 F.2d 1203, 1213-15 (7th Cir. 1980) (requirement that adult bookstore license applicant submit to inspection of premises was held unconstitutional). But cf. Young v. American Mini Theatres, Inc., 427 U.S. 50, 62-63 (1976) (adult movie theatres may be licensed if licensing is necessary to valid zoning and locational requirements); Genusa, 619 F.2d at 1212-13 (same for adult bookstores).

The Supreme Court has not ruled directly on the licensing issue in an obscenity case.

The padlock cases are also pertinent, although not directly on point. The results in the padlock and other similar cases have varied. The Supreme Court has never ruled on the question of whether a padlock obscenity law is an unconstitutional prior restraint.[2] Because this is a license revocation ordinance case, we need not give an opinion on the padlock laws which are usually less intrusive than license revocation. But a review of a few of the cases is instructive.

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[2] See Avenue Book Store v. City of Tallmadge, 459 U.S. 997, 998 (1982) (White, J., dissenting to the Supreme Court's denial of certiorari, quoted infra note 3).

In Universal Amusement Co. v. Vance, 587 F.2d 159 (5th Cir. 1978), the Fifth Circuit held that a nuisance statute's provision for temporary closure of businesses distributing obscene material was an unconstitutional prior restraint of business operators' rights to engage in protected expression during the closure period. The Supreme Court affirmed at 445 U.S. 308 (1980), but, in affirming, the Court aimed its per curiam opinion at the fact that under the statute a prosecutor could obtain a temporary restraining order and preliminary injunction against showing certain named and unnamed films before judicial determination that the films were indeed obscene. 445 U.S. at 316 n. 14. The Court held that this procedure was an unconstitutional prior

restraint.[3] Several other courts have held padlock obscenity laws invalid. See Cornflower Entertainment, Inc. v. Salt Lake City Corp., 485 F.Supp. 777

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[3] See Justice White's dissent in which he argues that the Court misunderstood the statute's provision dealing with an injunction to be issued after judicial determination that the material involved was obscene. 445 U.S. at 320-25. See also the dissent to the Supreme Court's denial of certiorari in Avenue Book Store in which Justice White states:

> In Vance v. Universal Amusement Co., 445 U.S. 308 (1980), the Court upheld a finding that a Texas public nuisance statute authorized an unconstitutional "prior restraint for indefinite duration on the exhibition of motion pictures without a final judicial determination of obscenity and without any guarantee of prompt review of a preliminary finding of probable obscenity." Id. at 309. Fatal to that statute were particular procedural infirmities of the Texas nuisance scheme whereby the subject of an abatement order or injunction "would be subject to contempt proceedings even if the film [was] ultimately found to be nonobscene." Id. at 316.

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(D.Utah 1980); People ex rel. Busch v. Projection Room Theatre, 17 Cal.3d 42, 130 Cal.Rptr. 328, 550 P.2d 600, cert. denied sub nom., Van De Kamp v. Projection Room Theatre, 429 U.S. 922 (1976); State v. A Motion Picture Entitled "The Bet", 219 Kan. 64, 547 P.2d 760 (1976); see also Note, Pornography, Padlocks, and Prior Restraints: The Constitutional Limits of the Nuisance Power, 58 N.Y.U.L. Rev. 1478, 1489 (1983) ("courts generally have assumed that padlock orders are

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> The Court has never determined however, whether abatement orders, such as the one involved in the present case, will pass constitutional muster when they permanently enjoin the use of a business premises for the sale or display of obscene material, but do not subject the owner to contempt sanctions unless there has been a judicial determination of obscenity.

prior restraints without engaging in substantial analysis under prior restraint doctrine.").[4]

On the other hand, several state courts have held that padlock laws aimed at businesses involved in the sale or exhibition of obscene material are not prior restraints. In State ex rel. Kidwell v. U.S. Marketing, Inc., 102 Idaho 451, 631 P.2d 622 (1981), appeal dismissed sub nom., U.S. Marketing, Inc. v. Idaho, 455 U.S. 1009 (1982), the Idaho Supreme Court dealt with a state

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[4] Accord J.R. Distributors, Inc. v. Eikenberry, 725 F.2d 482 (9th Cir. 1984), rev'd on other grounds sub nom., Brockett v. Spokane Arcades, Inc., 105 S.Ct. 2794 (1985). In Eikenberry the Ninth Circuit stated as dictum (see 105 S.Ct. at 2797 n.5; 725 F.2d at 498 (Wallace, J., dissenting))that an obscenity abatement law's provision requiring forfeiture of profits derived from the sale of both obscene and nonobscene material unconstitutionally restricted free speech rights in the nonobscene material.

nuisance law providing that if a business is engaged in selling or exhibiting obscene material, the real property used in the business is forfeited for a period of one year. The defendant argued that this forced forfeiture constituted an unconstitutional prior restraint on business operators' first amendment rights to engage in protected, nonobscene expression. The court noted that under Roth v. United States, 354 U.S. 476 (1957), the state could punish purveyors of obscene material and that the state was not limited to criminal sanctions as a weapon against obscenity. Kingsley Books v. Brown, 354 U.S. 436, 441 (1957). The court held that the purpose of the nuisance law was to deter dealing in obscenity, and, in response to the prior restraint argument, it stated:

> By way of example, if a bookseller, having fallen behind on his property taxes, loses his bookstore at a tax sale, he will not be heard to complain that the state has imposed an unlawful prior restraint upon his bookselling activities. If that same bookseller is convicted of the crime of distributing obscene materials, he may be imprisoned, and yet he will not be heard to complain that his incarceration constitutes a prior restraint upon his ability to disseminate protected speech, even though it is quite clear that it has that effect.
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> * * *
>
> The one-year forfeiture provision of the Idaho moral nuisance statute avoids the particularly noxious specter of content control. Like a tax sale, the forfeiture is directed strictly at property, apart from the content of any expression contained therein. And like imprisonment for a criminal obscenity transgression, the forfeiture is intended to penalize past distributions of illegal and unprotected obscenity. The legislature could just as easily have imposed a fine or other property-related penalty. Instead, the legislature chose to punish the violator by temporarily depriving him of the property which was used in committing the violation.

631 P.2d at 627-28.

Under this line of analysis, similar to Justice Butler's argument in dissent in Near, if the nuisance abatement procedure is seen as a means of deterring or punishing purveyors of obscene material, preventing a business operator from selling or exhibiting any publications or films in the future is no more of a prior restraint than closing his business for drug or weapons violations would be. Along these lines see State ex rel. Calahan v. Diversified Theatrical Corp., 59 Mich.App. 223, 229 N.W.2d 389 (1975), rev'd on other grounds, 396 Mich. 244, 240 N.W.2d 460 (1976).

IV.

As noted by the Idaho Supreme Court in Kidwell, not all laws that have the effect of preventing a person from engaging in protected expression in the future are prior restraints as that term

has been developed. Assuming a valid statute, the state of Kentucky could incarcerate a person who is properly convicted of violating Kentucky's obscenity statute. See Ginzburg v. United States, 383 U.S. 463 (1966) (upholding conviction for violation of federal obscenity statute; defendant had been sentenced to serve five years) and Ky. Rev. Stat. § 531.020 (1985) (distributing two pieces of obscene matter is a class A misdemeanor in Kentucky, which may result in imposition of up to a one-year jail sentence). If a bookstore operator were convicted for selling obscene material in his store and were sentenced to serve time in the state prison, his ability to continue to personally sell nonobscene books in his store would be foreclosed for the duration of his incarceration. But it

is doubtful that he could make a valid argument that the state law under which he was incarcerated is a prior restraint of his right to engage in protected expression by selling nonobscene books.

Similarly, it is doubtful that he could make a valid argument that a nuisance abatement law applied to obscenity is an unconstitutional prior restraint if the law is narrowly structured as a deterrent or punishment of purveyors of obscenity. If, on the other hand, the abatement procedure focuses on regulating the future speech of a defendant who has been adjudged "guilty" of distributing obscene material, the law is tantamount to a licensing statute establishing a prior restraint of the defendant's first amendment right to engage in nonobscene expression. To use the language of Near

v. Minnesota, a nuisance abatement procedure applied to obscenity should be upheld if "[t]he object of the [procedure] is punishment, in the ordinary sense, [rather than] suppression of the offending [business]" and if the procedure does not "operat[e] to...put the publisher under an effective censorship." 283 U.S. at 709-12.

No doubt one of the purposes of Paducah's license revocation ordinance is to deter the sale and exhibition of obscene material. But the ordinance goes beyond this purpose as District Judge Johnstone found. The main thrust of the abatement procedure is the revocation of all licenses and permits under which the business in question operates. Even under the so-called padlock laws, a business operator remains free to engage in protected

expression in another location. Paducah's procedure of revoking business licenses is more restrictive in that it essentially prevents the offending business from engaging in future distribution of protected, nonobscene material anywhere within the City of Paducah. We therefore conclude that the ordinance's use of license revocation as a weapon against obscenity goes beyond merely deterring or punishing individuals who deal in obscene material. The ordinance's purpose, as evidenced by the license revocation provision, is to control future expression by businesses that have been subjected to the nuisance abatement procedure. The ordinance is a prior restraint of plaintiff's freedom of expression.

Of course, not all prior restraints of free speech are unconstitutional.

But none of the exceptions are present here. In order to be valid, a system imposing a temporary prior restraint must implement certain procedural safeguards required by Supreme Court precedent. These safeguards are drawn from Freedom v. Maryland, 380 U.S. 51 (1965), and more recently from Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 560 (1975), in which the Court stated:

> First, the burden of instituting judicial proceedings, and of proving that the material is unprotected, must rest on the censor. Second, any restraint prior to judicial review can be imposed only for a specified brief period and only for the purpose of preserving the status quo. Third, a prompt final judicial determination must be assured.

As to the obscene material whose sale or exhibition triggered the application of Paducah's ordinance, the

safeguards are adequate. Or, more accurately, there is no restraint at all before a judicial hearing is conducted, since the sale and exhibition of the material is not restrained until after a judicial determination that the material is indeed obscene.[5] As discussed above, however, the license revocation procedure would still operate as a prior restraint on plaintiffs' future distribution of nonobscene expression.

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[5] The parties have not argued the possibility that in an enforcement action Paducah might obtain, under Kentucky state court procedures, a temporary restraining order directed at allegedly obscene material before the material had been judicially adjudged obscene. We note that the majority of the Supreme Court spoke to such a procedure in Vance v. Universal Amusement, 445 U.S. 308 (1980), but that is not an issue here.

Neither the parties nor the District Court has addressed the possibility that the ordinance's unconstitutional use of license revocation may be severable from the remainder of the ordinance. In the absence of argument on the issue, we also decline to address the severability question. The ordinance violates plaintiffs' first amendment right of freedom of expression. Accordingly, we hold the ordinance facially invalid, and we affirm the District Court's judgment.

WELLFORD, Circuit Judge, concurring.

The City of Paducah originally sought to enforce the ordinance in question against Beltline News and Arcade Club (Beltline) and against the other defendant, Investment Entertainment, Inc. (Investment), in state court. The action against the

latter was successfully removed by Investment to federal district court, but the other is pending against Beltline in state court. The defense of abstention was presented by the City in its answer to Investment's complaint and amended complaint in the district court. This is the kind of factual situation in which abstention may be appropriate because the ordinance's scheme contemplates a full state court hearing before revocation of defendants' operating licenses and privileges becomes effective. State courts are fully competent to hear and to consider the constitutional challenges, federal and state, here made to the procedures involved in the disputed ordinance. The state court, of course, may first test the ordinance and its procedure under standards of the Kentucky Constitution; accordingly, it might

avoid the necessity of a decision on the federal Constitution in a complex and difficult area.

> Reflected among the concerns which have traditionally counseled a federal court to stay its hand are the desirability of avoiding unseemly conflict between the two sovereignties, the unnecessary impairment of state functions, and the premature determination of constitutional questions.

Martin v. Creasy, 360 U.S. 219, 224 (1959).

In Martin, the Court noted that the Pennsylvania law challenged as unconstitutional had not yet been construed by state courts, and there was "no reason to suppose that the Commonwealth of Pennsylvania will not accord full constitutional scope...." Id. at 225. This case would have been an appropriate vehicle for abstention since the district court might have awaited a decision of the state court in Beltline before deciding the sensitive

federal constitutional issue in Investment. However, because the City did not actively pursue the abstention issue before this court and has apparently not urged the state court promptly to render a decision in Beltline, this issue has been waived, although initially suggested by the City in its answer to the federal action. See Ohio Bureau of Employment Services v. Hodory, 431 U.S. 471, 479-80 (1977).

The difficulty in this area of the law is well expressed in the various viewpoints of the Justices set out in Vance v. Universal Amusement Co., 445 U.S. 308, 320 (1980). Perhaps the Supreme Court will determine whether an abatement or revocation of the kind contemplated in the Paducah ordinance will pass constitutional muster in deciding the case now pending before it for disposition. People ex rel. Arcara

v. Cloud Books, Inc., 119 Misc.2d 505, 465 N.Y.S.2d 633, later proceeding, 96 A.D.2d 751, 465 N.Y.S.2d 699 (1983), aff'd, 101 A.D.2d 163, 475 N.Y.S.2d 173 (1984), certified question answered and modified, 65 N.Y.2d 324, 491 N.Y.S.2d 307, cert. granted, 106 S.Ct. 379 (1985).

I emphasize, on the merits of this case, as found by Judge Merritt, that the procedural safeguards of the Paducah ordinance appear to be adequate solely in respect of the allegedly obscene materials because there is no prior restraint involved with regard to any claimed first amendment freedom of expression until after a judicial determination has been made on obscenity. It is the future effect of revocation of an operating license, the remedy that is provided, that is especially troublesome in this case.

We have recently stated with respect to a city ordinance dealing with an effort to control what was deemed to be potential obscene conduct in licensed clubs through revocation of an occupational license:

> We hold further that the ordinance does not constitute an impermissible prior restraint upon either present or future restricted expression. The appellants' argument that their zoning status would be altered if their occupational licenses were revoked does not constitute a reason to invalidate the ordinance as a prior restraint. In this case, prescreening discretion is not vested in any administrative body, as in Near v. Minnesota, 283 U.S. 697 (1931), and the dangers of censorship are not present.

Iacobucci v. City of Newport, Ky., 785 F.2d 1354, 1359 (6th Cir. 1986) (emphasis added).

I do not harbor the serious reservations of Judge Merritt that obscenity ordinances may not, under any circumstances, validly revoke a business

license of one dealing in obscenity, properly defined, in a particular location. A permanent revocation of license may be too broad a sanction in the situation before us. I have no problem, as did the district court, with the words "regular course of business" and "repeatedly" as used in the ordinance in question. I do not find them "vague" or overbroad, examined in context with their use in the ordinance.

I concur in the result reached by Judge Merritt in this case. I do not, however, adopt the rationale of J-R Distributors, Inc. v. Eikenberry, 725 F.2d 482 (9th Cir. 1984), rev'd on other grounds sub nom., Brockett v. Spokane Arcades, Inc., 105 S.Ct. 2794 (1985).

APPENDIX "B"

Opinion of the United States District Court, Western District of Kentucky at Paducah, Kentucky in City of Paducah v. Investment Entertainment, Inc., and Showtime Entertainment, Inc., Civil Action No. 83-0217-P(J), Consolidated with Investment Entertainment, Inc. v. City of Paducah, et al., Civil Action No. 83-0208P(J).

(Reference: Petition of Writ of Certiorari at page 2, line 12; page 14, line 14; page 19, lines 12 and 14).

....B-1 thru B-19

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CITY OF PADUCAH,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CIVIL ACTION
	)	NO. 83-0217-P(J)
INVESTMENT ENTERTAIN-	)	
MENT, INC., and SHOW-	)	
TIME ENTERTAINMENT,	)	
INC.,	)	
	)	
Defendants.	)	
	)	
CONSOLIDATED WITH:	)	
	)	
INVESTMENT ENTERTAIN-	)	
MENT, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CIVIL ACTION
	)	NO. 83-0208-P(J)
CITY OF PADUCAH,	)	
et al.,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION

These consolidated actions concern the constitutionality of Ordinance No. 83-6-2388 of the City of Paducah. The litigation was initiated in this court on August 3, 1983, with Investment

Entertainment, Inc. seeking a declaration that the ordinance was unconstitutional and a permanent injunction preventing the City from proceeding against Investment under the provisions of the ordinance. Investment's action was subsequently consolidated with an enforcement action brought against Investment in state court, and removed by Investment to this court. Investment's defense and counter-claim in the removal action are essentially the same as its claim in the original action, i.e., that the ordinance is unconstitutional and violates its rights under the First and Fourteenth Amendments to the United States Constitution. Investment's original action also presents a claim under 42 U.S.C. § 1983. Showtime Entertainment, Inc. was added as a party when it was learned that Showtime might

have an interest in the property involved in the enforcement action against Investment. (For convenience this opinion will refer only to Investment; however, the court's decision will also apply to Showtime).

Jurisdiction over Investment's original action exists under 28 U.S.C. Sections 1331, and 1343(3). Jurisdiction over the removal action exists under 28 U.S.C. § 1332, through the provisions in 28 U.S.C. § 1441. These matters are now before the court on cross motions for summary judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure.

Ordinance No. 83-6-2388 was enacted on June 14, 1983. It deals with the sale and exhibition of obscene materials, and attempts to prohibit sales and exhibitions through the City's power to declare and abate public

nuisances. The ordinance declares the following to be public nuisance per se:

(A) Any and every place in the City of Paducah where obscene films are publicly exhibited as a regular course of business, or possessed for the purpose of such exhibition.

(B) Any and every place in the City of Paducah where an obscene film is publicly and repeatedly exhibition, or possessed for the purpose of such exhibition; and

(C) Any and every obscene film which is publicly exhibited or possessed for such purpose at a place which is a public nuisance under this section.

City of Paducah, Ordinance No. 83-6-2388, Section 19-152. Also declared a public nuisance are:

(A) Any and every place of business in the City of Paducah in which obscene publications constitute all of the stock in trade, or a principal part thereof. Where such obscene publications constitute only a part of the stock in trade and are located in a place or places within such business which are capable of demarcation, such

> place or places constitute the public nuisance which requires abatement; and
>
> (B) Any and every obscene publication possessed at a place which is a public nuisance under this Section.

id. at Section 19-153. Additionally, the ordinance provides that once a certified copy of the ordinance and a certified copy of the resolution required under the ordinance have been served on the place in question, or on the persons responsible for the place, all monies paid as admission to the obscene exhibitions and all valuable consideration received for the sale of the obscene publications shall also be regarded as public nuisances. Id. at Sections 19-152 and 19-153.

The ordinance also prescribes procedures for identifying and abating the nuisances. The City's Board of Commissioners must initially make a

specific finding that a public nuisance exists. Id. at Section 19-155. Once this is determined, the Board, in order to implement the provisions of the ordinance, must pass a detailed resolution. The resolution must declare that a nuisance exists, describe its location, and set forth the facts on which the nuisance determination was based. Id. It must order that all operating licenses and permits associated with the declared nuisance be revoked (subject to confirmation by mandatory judicial proceedings), that the nuisance be abated, and that specific notice be given to those persons deemed to have knowledge of the nuisance. Id. The resolution must also order the Corporate Counsel to initiate judicial proceedings to abate the nuisance. Id. The judicial proceedings are to be initiated within five working

days after passage of the resolution. Id. at Section 19-156. In those proceedings, the Corporate Counsel must seek a court order that the materials in question are obscene, that the places in question are public nuisances, and that the Board's action in revoking the operating licenses and permits was lawful. Id. The Ordinance also directs the Corporate Counsel to seek an injunction against the persons maintaining the nuisance, enjoining them from selling or exhibiting the materials declared to be obscene and from possessing the materials for purposes of sale or exhibition. Finally, the Corporate Counsel must seek an order of forfeiture against the obscene films and publications, and all monies determined by the court to have been received through their exhibition and sale. Id.

On August 3, 1983, the City's Board of Commissioners utilized Ordinance No. 83-6-2388 to take action against Investment. Through the required resolution, the Board declared that Investment, and all materials possessed by Investment, were public nuisances, ordered that Investment's operating licenses and permits be revoked (subject to judicial confirmation), and ordered the Corporate Counsel to initiate the necessary judicial proceedings. The Board's findings and resolution were based solely upon testimony from an undercover policeman who visited Investment on June 22, July 2, and July 10, 1983, and the Board's examination of two video tapes and two magazines purchased by the undercover policeman.

DISCUSSION

For summary judgment purposes, Investment concedes that the video tapes

and magazines examined by the Board are "obscene." Furthermore, Investment does not challenge the constitutionality of the "obscene matter" definition contained in the ordinance. Investment does contend that the provisions of the ordinance, and the actions taken against it pursuant to those provisions, violate constitutional guarantees of due process. Investment also contends that the ordinance imposes an impermissible prior restraint on speech and impermissibly punishes protected speech.

Investment's due process argument centers around procedural and evidentiary matters. Specifically, it contends that a determination that Investment and all materials possessed there are public nuisances is unconstitutional, if it is based solely upon general testimony from an officer who visited the business, and a finding

that two video tapes and two magazines purchased from the business are obscene. This argument fails to recognize that the actions taken by the Board of Commissioners had no binding effect on whether Investment, or any of the materials possessed by Investment, would ultimately be determined to be a public nuisance and subjected to closure or forfeiture. The only effect of the Board's action was the initiation of judicial proceedings against investment. The ordinance recognizes that all final and binding determinations must be made by the court involved in the judicial proceedings. Due process does not require that decisions to initiate judicial proceedings be made pursuant to some type of evidentiary standard or that they be made only after notice has been given to the affected parties. Viewed strictly as a means of

determining when to initiate judicial proceedings, the ordinance does not violate due process. See Buena Vista Cinema, 129 Cal. Rptr. 315, 318 (Cal. Ct.App. 1976).

The ordinance does not, however, serve solely as a means for determining when to initiate judicial proceedings. Indeed, although the ordinance leaves the ultimate procedural and evidentiary standards in the hands of the court conducting the required judicial proceedings, it expressly defines the property constituting a "public nuisance," thereby establishing the scope of the judicial proceedings and setting the standard for the substantive nuisance determination. Investment's prior restraint and impermissible punishment of protected speech arguments relate to these public nuisance declarations. Investment does not

contend that it is improper for the City to declare what property constitutes a public nuisance, or even that it is improper for the City to declare that obscene materials constitute a public nuisance, subject to proper procedural safeguards; however, Investment does contend that Ordinance No. 83-6-2388 declares property to be a public nuisance in a way which impermissibly punishes non-obscene, protected speech. The court agrees. Attempts to regulate obscenity must be drafted in a manner that will "ensure against the curtailment of constitutionally protected expression, which is often separated from obscenity only by a dim and uncertain line." Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 66, 83 S.Ct. 631, 637 (1963). Accordingly, constitutional guarantees of freedom of speech mandate that laws regulating

speech be carefully drawn so as to punish only unprotected speech and not intrude upon protected expression. Gooding v. Wilson, 405 U.S. 518, 522, 92 S.Ct. 1103, 1106 (1972). Ordinance No. 83-6-2388 intrudes upon protected speech by declaring an entire place of business to be a public nuisance upon a finding that the place publicly and repeatedly exhibits obscene films, exhibits obscene films as a regular course of business, possesses obscene films for such exhibitions, or maintains obscene publications as its principal stock in trade. See Ordinance No. 83-6-2388 at Sections 19-152 and 19-153. By focusing on the places of sale and exhibition, rather than merely upon the materials sold or exhibited, the ordinance intrudes upon protected speech. Specifically, it prevents an entire place from disseminating

constitutionally protected, non-obscene materials, simply because the place has sold or exhibited obscene materials in the past. The dangers of such a ban are readily illustrated. For example, a movie theatre that showed The Ten Commandments, Snow White, or Gone With the Wind during the week could be closed and prevented from showing any movies, if it happened to show a film each Saturday night at midnight that was ultimately determined to be obscene, assuming that once a week constitutes "repeatedly" exhibiting. Similarly, an entire book store could be closed if it sold materials later determined to be obscene, even if the store also sold The Bible, A Tale of Two Cities, and The New York Times. Such all-encompassing prohibitions directed at places of sale or exhibition are unconstitutional. See J-R Distributors, Inc. v. Eikenberry,

725 F.2d 482, 494 (9th Cir. 1984), prob. juris. noted, ___U.S.___, 105 S.Ct. 77 (1984). See also Universal Amusement Co. v. Vance, 587 F.2d 159, 165-166 (5th Cir. 1978). (en banc), aff'd. 445 U.S. 308, 100 S.Ct. 1156 (1980); People ex rel. Busch v. Projection Room Theater, 550 P.2d 600 (Cal. 1976), cert denied, 429 U.S. 922, 97 S.Ct. 320 (1976). See generally Cornflower Entertainment, Inc. v. Salt Lake City Corp., 485 F.Supp. 777, 785-786 (D. Utah 1980); State v. A Motion Picture Entitled "The Bet," 547 P.2d 760 (Kan. 1976). Moreover, because the ordinance allows the entire business to be declared a public nuisance, it encourages a business person to steer wide of danger by avoiding questionable but nonetheless protected films and publications. See Vance, 587 F.2d at 166. Thus, given that the line between protected and unprotected speech is dim

and uncertain, the broad closure provision contained in Ordinance No. 83-6-2388 will result in self-censorship of protected but questionable materials as business persons avoid those materials in an effort to prevent their entire business from being declared a public nuisance. Thus, a new Ulysses might never be disseminated because of the threat of having the entire place of business closed if the questionable item was later determined to be obscene. See Vance, 587 F.2d at 156. Ordinance No. 83-6-2388 especially encourages self-censorship by its vague standards. The ordinance does not define "regular course of business," "repeatedly," or "principal part," yet it uses these terms to draw the line at where a place selling or exhibiting obscene materials becomes a public nuisance. Ordinance No. 83-6-2388 at Sections 19-152 and

19-153. There is no way that a business person could know in advance whether once-a-week or once-a-day amounted to "repeatedly" or whether two magazines or twenty magazines constituted a "principal part."

CONCLUSION

Materials which have been properly determined to be legally obscene are not within the free speech protection afforded by the constitution and, therefore, are subject to regulation. See Sullivan, 372 U.S. at 65, 83 S.Ct. at 637. Accordingly, although the issue is not squarely presented in the present case, an ordinance which focused a government's public nuisance powers solely upon obscene materials would not appear to be invalid. On the other hand, non-obscene materials are entitled to great protection, and therein lies the danger of Ordinance No. 83-6-2388.

By going beyond the obscene materials themselves and focusing on the places where the obscene materials are sold or exhibited, the ordinance improperly intrudes upon protected expression. Because of this focus on places rather than materials the court finds that Sections 19-152(A) and (B) and Section 19-153(A) are unconstitutional. See Eikenberry, 715 F.2d at 493-496, and cases cited therein; Vance, 587 F.2d at 164-166; Busch 550 P.2d at 600. The City has cited one case supporting a contrary conclusion, State ex rel. Kidwell v. U.S. Marketing, 631 P.2d 622 (Idaho 1981), however, the court has chosen to rely upon the cases cited above; cases which direct a finding that the ordinance provisions are unconstitutional. The court further concludes that Section 19-152(C) and Section 19-153 (B) are dependent upon

the nuisance declarations in Sections 19-152(A) and (B) and Section 19-153(A) and, therefore, are also unconstitutional. The sections are dependent because even though they refer to materials rather than places, they only refer to materials which are sold or exhibited at places defined as public nuisances under the sections which the court has declared unconstitutional.

An appropriate order will be entered.

DATED: 1-5-85

Edward H. Johnstone, Judge
United States District Court

APPENDIX "C"

City of Paducah, Kentucky Public Nuisance Abatement Ordinance No. 83-6-2388, passed by the Board of Commissioners of Paducah, Kentucky on June 14, 1983.

(Reference: Petition for Writ of Certiorari at page 5, line 19; page 9, line 17; page 11, lines 2, 5, 14).

....C-1 thru C-29

ORDINANCE NO. 83-6-2388

AN ORDINANCE OF THE CITY OF PADUCAH DECLARING THE COMMERCIAL EXPLOITATION OF OBSCENE MOTION PICTURE FILMS AND OBSCENITY PUBLICATIONS TO BE CONTRARY TO PUBLIC HEALTH, SAFETY, AND GENERAL WELFARE, AND A PUBLIC NUISANCE; DECLARING ANY PLACE DISPLAYING OR EXHIBITING SUCH OBSCENE MOTION PICTURE FILMS OR PUBLICATIONS TO BE A PUBLIC NUISANCE PER SE; MAKING ALL OBSCENE MATTER AND PUBLICATIONS POSSESSED IN SUCH PLACES A PUBLIC NUISANCE PER SE; PROVIDING FOR NOTICE AND LEGAL PROCEEDINGS TO ABATE THE SAME; AND PROVIDING A PROCEDURE FOR ASSESSMENT AND COLLECTION OF COSTS OF ABATEMENT.

BE IT ORDAINED BY THE BOARD OF COMMISSIONERS OF THE CITY OF PADUCAH, KENTUCKY:

Section 1. That the Board of Commissioners create Article VII of

Chapter 19 of the Code of Ordinances of the City of Paducah by adopting Sections 19-150, 19-151, 19-152, 19-153, 19-154, 19-155, 19-156, and 19-157 to read as follows:

"SECTION 19-150. PURPOSE; POLICY; AUTHORITY; APPLICATION.

The Board of Commissioners find that the crass commercial exploitation of explicit sexual conduct through the public exhibition of obscene films and the sale of obscene publications, constitutes a debasement and distortion of a sensitive key relationship of human existence, central to family life, community welfare and the development of human personality; that such exploitation is indecent and offensive to the senses and to public morals and interferes with the interest of the public in the quality of life and total community environment, the tone of

commerce in the City, property values, and the public safety; and that the continuation of such activities is detrimental to the best health, safety, convenience, good morals, and general welfare of the City of Paducah and of the residents, citizens, inhabitants, and business thereof and is unlawful and may not be made the subject of a lawful license. Pursuant to Section 82.082 of the Kentucky Revised Statutes, the Board of Commissioners hereby declares such activities to be public nuisances, and establishes procedures for the abatement thereof and for the assessment and collection of costs of abatement which may be incurred by the City incident to such abatement. This ordinance shall apply to existing establishments which are presently engaged in the activities herein declared to be public nuisances.

"SECTION 19-151. DEFINITIONS.

(A) "Knowledge" or "knowledge of such nuisance" means having knowledge of the contents and character of the patently offensive sexual conduct which appears in the obscene matter.

(B) "Obscene matter" means matter, taken as a whole, the predominant appeal of which to the average person, applying contemporary standards, is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion; and is matter which taken as a whole goes substantially beyond customary limits of candor in description or representation of such matters; and is matter which taken as a whole is utterly without redeeming social importance.

(1) The predominant appeal to prurient interest of the matter is judged with reference to average adults

unless it appears from the nature of the matter or the circumstances of its dissemination, distribution or exhibition, that it is designed for clearly defined deviant sexual groups, in which case the predominant appeal of the matter shall be judged with reference to its intended recipient group.

(2) Where circumstances of production, presentation, sale, dissemination, distribution, or publicity indicate that matter is being commercially exploited by the defendant for the sake of its prurient appeal, such evidence is probative with respect to the nature of the matter and can justify the conclusion

that the matter is utterly without redeeming social importance.

Nothing herein contained is intended to include or proscribe any matter which, when considered as a whole, and in the context in which it is used, possesses serious literary, artistic, political or scientific value.

(C) "Matter" shall mean a motion picture film or a publication, or both;

(D) "Motion picture film" shall include any:

(1) film or plate negative;

(2) film or plate positive;

(3) film designed to be projected on a screen for exhibition;

(4) films, glass slides or transparencies, either in negative or positive form designed for exhibition by projection on a screen;

(5) Video tape or any other medium used to electronically reproduce images on a screen.

(E) "Person" means any individual, partnership, firm, association, corporation, or other legal entity;

(F) "Place" includes, but is not limited to, any building, structure or place, or any separate part or portion thereof, whether permanent or not, or the ground itself. "Place" also includes any money, slug or coin-operated vending machine, or mechanical or electronically controlled vending machine, which is located upon or is accessible from a public sidewalk or thoroughfare;

(G) "Publication" shall include any book, magazine, newspaper, article, pamphlet, writing, printing, illustration, picture, sound recording, or a motion picture film when such film

is offered for sale or exhibited in a coin-operated machine.

(H) "Sale" means a passing of title or right of possession from a seller to a buyer for valuable consideration, and shall include, but is not limited to, any lease or rental arrangement or other transaction wherein or whereby any valuable consideration is received for the use of, or transfer of possession of, obscene matter.

SECTION 19-152. OBSCENE FILMS AND THEATERS EXHIBITING THE SAME DECLARED A PUBLIC NUISANCE PER SE; ADMISSION PRICE RECEIVED AFTER SERVICE OF RESOLUTION TO BE REGARDED AS A PUBLIC NUISANCE PER ACCIDENS.

The following are declared to be public nuisances per se:

(A) Any and every place in the City of Paducah where obscene films are publicly exhibited as a regular course

of business, or possessed for the purpose of such exhibition;

(B) Any and every place in the City of Paducah where an obscene film is publicly and repeatedly exhibited, or possessed for the purpose of such exhibition; and

(C) Any and every obscene film which is publicly exhibited or possessed for such purpose at a place which is a public nuisance under this section.

From and after service on the theater, or its manager, or acting manager, or person then in charge of such place, of a certified copy of this ordinance and a certified copy of the resolution provided for herein, all monies paid thereafter as admission price to such exhibitions shall be regarded as being a public nuisance per accidens, as personal property used in conducting and maintaining a declared

public nuisance as to which forfeiture will be requested in the judicial proceedings required herein.

"SECTION 19-153. PLACE OF BUSINESS IN WHICH OBSCENE PUBLICATIONS CONSTITUTE A PRINCIPAL PART OF THE STOCK IN TRADE AND OBSCENE PUBLICATIONS POSSESSED THEREIN DECLARED A PUBLIC NUISANCE PER SE; VALUABLE CONSIDERATION RECEIVED FOR SALE AFTER SERVICE OF RESOLUTION TO BE REGARDED AS A PUBLIC NUISANCE PER ACCIDENS.

The following are declared to be public nuisances per se:

(A) Any and every place of business in the City of Paducah in which obscene publications constitute all of the stock in trade, or a principal part thereof. Where such obscene publications constitute only a part of the stock in trade and are located in a place or places within such business

which are capable of demarcation, such place or places constitute the public nuisance which requires abatement; and

(B) Any and every obscene publication possessed at a place which is a public nuisance under this Section.

From and after service on the place, or its manager, or acting manager, or person then in charge of such place, of a certified copy of this ordinance and a certified copy of the resolution provided for herein, all valuable consideration received for the sale of such obscene publications shall be regarded as being a public nuisance per accidens, as personal property used in conducting and maintaining a declared public nuisance, as to which forfeiture will be requested in the judicial proceedings required herein.

"SECTION 19-154. KNOWLEDGE OF NUISANCE PRESUMED FROM SERVICE OF COPY OF RESOLUTION; RESPONSIBILITY OF PARTIES THEREFOR; ABATEMENT OF SUCH NUISANCES.

(A) Upon receiving notice through service of a certified copy of this ordinance and of a certified copy of the resolution provided for herein, any and every person who shall own, legally or equitably, lease, maintain, manage, conduct, or operate a place in the City of Paducah which is declared to be a public nuisance as set forth and stated in Section 19-152 or Section 19-153 of the Code of Ordinances of the City of Paducah, is deemed to be a person who has knowledge of such nuisance for the purpose of this ordinance and is, thereafter, responsible for its maintenance, and shall be liable therefor.

(B) The places and subject matter declared to be public nuisances under Section 19-152 or Section 19-153 of the Code of Ordinances of the City of Paducah shall be abated, as provided for herein.

"SECTION 19-155. ACTION TO BE TAKEN BY BOARD OF COMMISSIONERS.

Upon a specific finding that a public nuisance, as defined in Section 19-152 or Section 19-153 of the Code of Ordinances of the City of Paducah, exists in the City of Paducah, the Board of Commissioners, in applying the provisions of this ordinance to such nuisance, shall provide for the following by resolution:

(A) Declare the fact that such nuisance exists;

(B) Set forth the description or legal description and street address of the real property which constitutes the nuisance.

(C) Set forth a statement of facts upon which the Board of Commissioners' declaration of nuisance is based;

(D) Order the revocation of all licenses and permits which have been issued as a part of the operation of such business, subject to confirmation by the court in the judicial proceedings required herein. Criminal proceedings for transacting business without a license at such address shall not be filed until the order of license revocation by the Board of Commissioners has been confirmed by judicial order;

(E) Order the Corporation Counsel to give written notice to all persons named in Section 19-154(a) of the Code of Ordinance of the City of Paducah, public nuisances immediately, by terminating the exhibitions of such obscene film or films and sale or offering for sale of such publications,

or causing the same to be terminated;

(F) Order the Corporation Counsel to proceed as directed in Section 19-156 of the Code of Ordinances of the City of Paducah and do all things necessary to abate such public nuisance through judicial proceedings and to conclude such proceedings as expeditiously as is permissible under the law;

(G) Inform and give notice to persons named in Section 19-154(A) of the Code of Ordinances of the City of Paducah that:

(1) The Board of Commissioners has determined that a public nuisance presently exists at such place and address, and has revoked the licenses and permits at that place, subject to court confirmation, and that, under Section 19-154 of the Code of Ordinances of the

City of Paducah they are deemed to have knowledge thereof and are responsible therefor;

(2) The Board of Commissioners has ordered the Corporation Counsel, as provided for under Section 19-156 of the Code of Ordinances of the City of Paducah, to commence legal proceedings naming such persons as defendants in a civil action to abate the same judicially, and to seek recovery in said action of the costs of abatement, including investigative costs, court costs, attorney fees, and other expenses and that under Section 19-157 of the Code of Ordinances of the City of Paducah, the costs of

abatement are made a special assessment against the parcel of land upon which the nuisance is maintained, but only against the interest, if any therein, of the person responsible for maintaining such nuisance and, upon their determination by the Board of Commissioners, will, by separate resolution, be made a lien against the real property interest of the person responsible for maintaining such nuisance;

(3) All obscene motion picture film or films or obscene publications being used in conducting and maintaining such public nuisances are considered to be contraband and the subject of forfeiture;

(4) The obscene motion picture film or films or obscene publications which are being used in conducting and maintaining such public nuisance will be needed at the hearing in the court having jurisdiction of the legal proceedings brought by the Corporation Counsel.

(5) From and after service on the place or its manager or acting manager, or person then in charge of such place, of a certified copy of this ordinance and a certified copy of such resolution, any and all monies paid as admission price to the exhibition or exhibitions of such obscene motion picture films, and valuable consideration

received for the sale of such obscene publications, shall be regarded as being a public nuisance per accidens, as personal property used in conducting and maintaining such nuisance, and as gain derived from a wrongful act, and that forfeiture of the same will be requested in the judicial proceedings required herein;

(H) Order that a certified copy of said resolution and a certified copy of this ordinance be delivered forthwith in any manner normally used to effectuate personal service of process as to all persons of record having any legal or equitable interest in the real property and to the regular or acting manager or persons in charge of the place therein declared a public nuisance.

"SECTION 19-156. ACTION TO BE TAKEN BY DISTRICT ATTORNEY.

Upon a specific finding by resolution of the Board of Commissioners of the fact that a public nuisance exists at a particular location, the Corporation Counsel shall:

(A) Forthwith, but not later than five (5) working days after passage of said resolution, commence legal proceedings by the filing of a civil action seeking the following relief:

(1) an order that the subject matter identified by the Board of Commissioners in said resolution is obscene as defined herein;

(2) an order that each place named by the Board of Commissioners is a public nuisance and that the action taken by the Board of Commissioners to revoke the

licenses issued to that place of business was lawful;

(3) an injunction enjoining and restraining all persons maintaining said nuisance from possessing or publicly exhibiting said obscene motion picture films, or from selling or possessing for sale said obscene publications at any time in the future in the City of Paducah, and such other injunctive relief as the court may order;

(4) an order that all positive prints of such obscene films and all such obscene publications or copies of reproductions thereof be forfeited as contraband;

(5) an accounting of all monies paid as admission price to the

exhibition or exhibitions of such obscene motion picture films and valuable consideration received for the sale of such obscene publications from and after the time the person or persons maintaining said nuisance received a copy of the resolution of the Board of Commissioners' finding that a public nuisance and a judgment that such monies are gain derived from a wrongful act and a public nuisance;

(6) an order that all admission price monies or valuable consideration received and enumerated in the court ordered accounting be forfeited as required by law;

(7) judgment of the City of Paducah for all costs expended in abating the public nuisance, including investigative costs, court costs, reasonable attorney fees, and such other expenses as are provided for herein; and

(8) all other relief as the court may deem proper.

(B) File a notice of the pendency of the action in the office of the McCracken County Clerk, giving the names of the parties, the object of the action, and a description of the property thereby affected.

"SECTION 19-157. COST OF ABATEMENT; ASSESSMENT; ASSESSMENT REPORT; HEARING ON ASSESSMENT REPORT; ASSESSMENT RESOLUTION; COLLECTION.

(A) The cost of abatement is hereby declared a special assessment against the parcel of land upon which the public nuisance is maintained, but only against the interest, if any therein, of the person or persons determined in the action to be responsible for maintaining such nuisance. As used herein, the term "cost of abatement" shall include, but is not limited to, the following: (1) investigative costs; (2) court costs; (3) reasonable attorney fees; and (4) printing costs for any trial and appeal.

(B) Upon the filing of a County Court judgment adjudicating the existence of a public nuisance in any proceedings instituted pursuant to these sections, the Corporation Counsel shall file with the City Clerk a written report containing his account of the expenses of abatement, the person or

persons determined in the action to be responsible for maintaining such nuisances, a description of the premises on which such abatement occurred, and the assessment against each lot or parcel of land proposed to be levied to pay the cost thereof. The clerk shall then set the report for hearing by the Board of Commissioners and shall, not less than ten (10) days prior to the date set for such hearing, serve notice of assessment upon the owners, which notice shall specify the day, hour and place when the Board of Commissioners shall hear and pass upon the assessment report together with any objections or protests thereto.

(C) Upon the date and hour fixed for the hearing, the Board of Commissioners shall hear and pass upon the assessment report together with any objections or protests which may be

raised by any of the owners of any property liable to be assessed for the costs of abatement of any other interested persons. The Board of Commissioners may make such revision, correction or modifications in the report as it may deem just, after which the report as submitted, or as revised, corrected or modified, shall be confirmed. The Board of Commissioners may adjourn the hearings from time to time. The decisions of the Board of Commissioners on all protests and objections which may be made shall be final and conclusive.

(D) Upon confirmation of the assessment report, the Board of Commissioners shall adopt a resolution specifying the amount assessed against each respective parcel as shown on the last available assessment roll in accordance with the assessment report.

Unless otherwise provided in such resolution, any such assessment shall become due thirty (30) days after adoption of such resolution and shall thereafter bear interest at the rate of fifteen per cent (15%) per year. The Board of Commissioners may provide in the resolution for payment to become due at any later date, in total sum or in installments.

(E) All assessments may be paid by tender of the amount due to the City Treasurer. The City Treasurer, prior to August 10 of each year, shall determine if any assessment, or portion thereof, is due and unpaid, and if he so determines, such assessment shall be collected at the same time and in the same manner as ordinary City taxes are collected and shall be subject to the same penalties and the same procedure and sale in case of delinquency as

provided for ordinary City taxes. All laws applicable to the levy, collection and enforcement of municipal taxes shall be applicable to the levy, collection and enforcement of municipal taxes shall be applicable to such special assessment.

SECTION 2. If any section, subsection, sentence, clause, phrase or portion of this ordinance is for any reason held to be invalid or unconstitutional by the decision of any court of competent jurisdiction, such decision shall not affect the validity of the remaining portions of this ordinance. The Board of Commissioners of the City of Paducah hereby declares that it would have adopted this ordinance and each section, subsection, sentence, clause, phrase or portion thereof irrespective of the fact that any one or more sections, subsections,

sentences, clauses, phrases or portions be declared invalid or unconstitutional.

SECTION 3. This ordinance shall be read on two separate days and will be effective upon publication of a certified summary thereof.

_____
Mayor

Introduced by the Board of Commissioners May 31, 1983

Passed by the Board of Commissioners June 14, 1983

Recorded by Louise McKinney, City Clerk, June 14, 1983

Published by The Paducah Sun June 20, 1983.

APPENDIX "D"

Resolution of the Board of Commissioners of the City of Paducah, Kentucky passed August 3, 1983, finding the business known as Tammy's Book Store To Be A Public Nuisance Pursuant to Section 19-153 of the Code of Ordinances of the City of Paducah As A Place of Business In Which Obscene Publications Constitute All of the Stock in Trade or a Principle Part of the Stock in Trade and Revoking All Licenses and Permits Except That No Criminal Proceedings May Be Filed for Transactions Business Without A License Until The Fact of Public Nuisance Has Been Confirmed by a Decree of the McCracken County Court in Judicial Proceedings.

(Reference: Petition for Writ of Certiorari at page 13 line 3).

....D-1 thru D-16

RESOLUTION

WHEREAS, on the 14th day of June, 1983, the Board of Commissioners of the City of Paducah adopted Ordinance No. 83-6-2388 declaring the commercial exploitation of obscene motion picture films and obscene publications to be contrary to the public health, safety, and general welfare, and a public nuisance, and

WHEREAS, on June 22, 1983, Officer Kermit Perdew visited a business located at 243 Brown Street, Paducah, Kentucky, known as Tammy's Book Store, and

WHEREAS, at that time said officer observed motion pictures, magazines, and other material which taken as a whole the appeal to the average person is to the prurient interest and the matter, taken as a whole, lacks any redeeming social importance, and

WHEREAS, on July 2, 1983 Officer Kermit Perdew returned to the place of business known as Tammy's Book Store and purchased the following material:

"EROTIC INTERLUDE", (Where one man's woman is another man's pleasure), a video tape (Beta); and "BACK DOOR" NUMBER TWO ("Come with us on a Journey and see just how much fun, anal sex can be!"), and

WHEREAS, on July 10, 1983, Officer Kermit Perdew again went to the premises of Tammy's Book Store and purchased the following material: "THE FILTHY RICH" (the secret pleasures of those who have it made), a video tape (Beta); and "MR/MRS" ("he had this thing for women's clothes.), and

WHEREAS, the Board of Commissioners conducted a public hearing on August 3, 1983, at the hour of 1:00 p.m. at which time the Board of Commissioners reviewed all of the above mentioned materials.

NOW THEREFORE, BE IT RESOLVED BY THE BOARD OF COMMISSIONERS OF THE CITY OF PADUCAH, AS FOLLOWS:

SECTION 1. The Board of Commissioners hereby finds the following facts: On July 2, 1983, the place of business located at 243 Brown Street, Paducah, Kentucky, known as Tammy's Book Store, sold the following materials:

Caballero Control Corporation Presents "EROTIC INTERLUDE", (Where one man's women is another man's pleasure). A video tape (Beta) with approximate running time of 84 minutes.

This material contains numerous explicit scenes of sex acts between males and females, females and females, including natural and contorted sexual intercourse, felatio and cunnilingus,

The Board of Commissioners after reviewing said material on August 3, 1983, finds that said material is

obscene under the ordinance of the City of Paducah and the statutes of the Commonwealth of Kentucky, in that the matter taken as a whole, the predominant appeal to the average person, applying contemporary community standards, is to the prurient interest. The material, taken as a whole, goes substantially beyond customary limits of candor of description and representation of such matters and, taken as a whole, the material is utterly without redeeming social importance.

SECTION 2. The Board of Commissioners hereby finds the following facts: On July 2, 1983, the place of business located at 243 Brown Street, Paducah, Kentucky, known as Tammy's Book Store, sold the following materials: "BACK DOOR" NUMBER TWO ("Come with us on a Journey and see just how much fun, anal sex can be!") from the publishers of Swedish Erotica Magazine and Books.

A 36 slick-page magazine containing color photographs in an explicit manner, sexual relations between men and women, including sexual intercourse (both natural and contorted) and acts of cunnilingus and felatio, and anal intercourse.

The Board of Commissioners after reviewing said material on August 3, 1983, finds that said material is obscene under the ordinances of the City of Paducah and the statutes of the Commonwealth of Kentucky, in that the matter taken as a whole, the predominant appeal to the average person, applying contemporary community standards, is to the prurient interest. The material, taken as a whole, goes substantially beyond customary limits of candor of description and representation of such matters and, taken as a whole, the material is utterly without redeeming social importance.

SECTION 3. The Board of Commissioners hereby finds the following facts: On July 10, 1983, the place of business located at 243 Brown Street, Paducah, Kentucky, known as Tammy's Book Store, sold the following material:

Swedish Erotica presents (distributed by Caballero Control Corporation) "THE FILTHY RICH" (the secret pleasures of those who have it made). A video tape (Beta) with approximate running time of 80 minutes.

The material contains numerous explicit scenes of sex acts between males and females, including natural and contorted sexual intercourse, felatio and cunnilingus, and masturbation.

The Board of Commissioners after reviewing said material on August 3, 1983, finds that said material is obscene under the ordinances of the City of Paducah and the statutes of the

Commonwealth of Kentucky, in that the matter taken as a whole, the predominant appeal to the average person, applying contemporary community standards, is to the prurient interest. The material, taken as a whole, goes substantially beyond customary limits of candor of description and representation of such matters and, taken as a whole, the material is utterly without redeeming social importance.

SECTION 4. The Board of Commissioners hereby finds the following facts: On July 10, 1983, the place of business located at 243 Brown Street, Paducah, Kentucky, known as Tammy's Book Store, sold the following material:

"MR/MRS" (he had this thing for women's clothes.) From the publishers of Swedish Erotica magazines and books.

A 36 click-page magazine containing color photographs depicting in an

explicit manner sexual relations between men and women, including sexual intercourse (both natural and contorted) and acts of cunnilingus and felation.

The Board of Commissioners after reviewing said material on August 3, 1983, finds that said material is obscene under the ordinances of the City of Paducah and the statutes of the Commonwealth of Kentucky, in that the matter taken as a whole, the predominant appeal to the average person, applying contemporary community standards, is to the prurient interest. The material, taken as a whole, goes substantially beyond customary limits of candor of description and representation of such matters and, taken as a whole, the material is utterly without redeeming social importance.

SECTION 5. The Board of Commissioners of the City of Paducah

hereby finds that the business known as Tammy's Book Store is owned and operated by Investment Entertainment, Inc. with its principal place of business at 243 Brown Street, Paducah, Kentucky.

SECTION 6. The Board of Commissioners hereby finds that the business known as Tammy's Book Store is a public nuisance and that all material possessed at 243 Brown Street, Paducah, Kentucky is a public nuisance pursuant to Section 19-152 and 19-153 of the Code of Ordinances of the City of Paducah.

SECTION 7. Tammy's Book Store is located at 243 Brown Street, Paducah, Kentucky, more particularly described as follows:

> Beginning on the south side of Brown Street at a tack of distance of 94.32 feet in a westerly direction from a southwest intersection of Brown Street and Beltline Highway (now Irvin Cobb Drive); thence at a right angle in a southerly direction a distance of 125 feet to an iron pipe; thence at

a right angle in a westerly direction a distance of 50 feet to an iron rod; thence at a right angle in a northerly direction a distance of 125 feet to an iron rod on the south line of Brown Street; thence with the south line of Brown Street at a right angle a distance of 50 feet in an easterly direction to the point of beginning.

Beginning the same property in all respects that was conveyed to Investment Entertainment, Inc. by deed dated the 21st day of March, 1983, and recorded in Deed Book 653, Page 239, in the McCracken County Court Clerk's Office.

SECTION 8. The Board of Commissioners hereby orders revocation of all licenses and permits that have been issued as a part of the operation of Tammy's Book Store and/or Investment Entertainment, Inc. subject to confirmation by the McCracken Circuit Court in judicial proceedings hereinafter required.

SECTION 9. The Board of Commissioners hereby orders the Corporation Counsel to give written

notice to all persons associated with 243 Brown Street, Paducah, Kentucky, including but not limited to Investment Entertainment, Inc., all employees and managers of Tammy's Book Store and/or Investment Entertainment, Inc. to abate the public nuisances immediately by terminating the exploitation of obscene film or films for sale or offering for sale of such publication or causing the same to be terminated.

SECTION 10. The Board of Commissioners further orders the Corporation Counsel to proceed as directed under Section 19-156 of the Code of Ordinances of the City of Paducah and to do all things necessary to abate such public nuisance through judicial proceedings and to conclude such proceedings as expeditiously as possible under the law. It is ordered that a certified copy of this Resolution

shall be served on the statutory agent of Investment Entertainment, Inc., all officers and employees and agents thereof, which can be found within the City of Paducah, that said business has been declared a public nuisance and has revoked the licenses and permits at that place, subject to court confirmation, and that under Section 19-154 of the Code of Ordinances of the City of Paducah they are deemed to have knowledge thereof and are responsible therefor. They shall further be notified that the Board of Commissioners has ordered the Corporation Counsel as provided under Section 19-156 of the Code of Ordinances of the City of Paducah to commence legal proceedings naming such persons as defendants in a civil action to abate the same judicially and to seek recovery in said action of the cost of said abatement,

including investigation costs, court costs, attorneys fees, and other expenses and under Section 19-157 of the Code of Ordinances of the City of Paducah. The costs of abatement are made a special assessment against the parcel of land upon which the business is maintained.

The Board of Commissioners, will, by separate resolution, place a lien against the real property interest or the person responsible for maintaining such nuisance. Said persons are to be further informed that all obscene motion picture film or films or obscene publications being used and maintaining such public nuisance are considered to be contraband and subject to forfeiture. Said persons are to be further notified that the obscene motion picture film or films or obscene publications which are being used in conducting and maintaining

such public nuisance will be needed at the hearing in court having jurisdiction of legal proceedings brought by the Corporation Counsel. Said persons shall further be notified that from and after the serving of notice on the place or its managing or acting manager or person then in charge of such place, or a certified copy of Ordinance No. 83-6-2388 of the City of Paducah and a certified copy of this Resolution, any and all monies paid as admission price to exhibitions of such obscene motion picture films, and valuable consideration received for the sale of such obscene publications, shall be regarded as a public nuisance per accident as personal property used in conducting and maintaining such nuisance, and as being gain derived from a wrongful act, and the forfeiture of same will be requested in the judicial proceedings required herein.

SECTION 11. The Board of Commissioners hereby orders that a certified copy of this Resolution and that a certified copy of Ordinance No. 83-6-2388 be delivered forthwith by the Police Department of the City of Paducah, or by certified mail properly deposited with the United States Post Office to all person of record having any legal or equitable interest in the real property, and to the regular or acting manager or person in charge of the place therein, declared a public nuisance.

SECTION 12. This Resolution is adopted according to law, and shall be effective immediately upon its adoption.

_____
Mayor

Passed by the Board of Commissioners August 3, 1983

Recorded by Louise McKinney, City Clerk, August 3, 1983.

I hereby certify that the above is a true and correct copy of a Resolution adopted by the City of Paducah on August 3, 1983.

_____
City Clerk

APPENDIX "E"

Complaint in the United States District Court For the Western District Of Kentucky, at Paducah, entitled "Investment Entertainment, Inc. v. City of Paducah, et al.," Civil Action File No. C83-0209P(J), filed August 3, 1983.

(Reference: Petition for Writ of Certiorari at page 3 line 10; page 15, line 16).

....E-1 thru E-8

Amended Complaint in the United States District Court For The Western District Of Kentucky at Paducah, entitled "Investment Entertainment, Inc. v. City of Paducah, et al.", Civil Action File No. 83-0208-P(J), August 10, 1983.

....E-9 thru E-15

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH
Civil Action File No. C83-0208P(J)

INVESTMENT ENTERTAINMENT, INC.	)	
PLAINTIFF	)	
VS.	)	COMPLAINT
CITY OF PADUCAH: JOHN K. PENROD, AS MAYOR, AND JOE VITERISI, ROBERT A. COLEMAN, HAROLD (SHORTY) FORD AND JAMES W. FLYNN, AS COMMISSIONERS OF SAID CITY: JAMES W. UTTER, AS CORPORATION COUNSEL, AND THURMAN BAKER, AS TREASURER THEREOF	)	
DEFENDANTS	)	

Plaintiff, Investment Entertainment, Inc., for its complaint herein says that:

1. The jurisdiction of this Court is invoked under the Constitution of the United States and the First and Fourteenth Amendments thereto; under Title 42, United States Code, Section

1983, providing that every person who under color of any statute, ordinance, regulation, custom or usage of any State subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by said Constitution shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress; under Title 28, United States Code, Section 1343 (3), conferring upon the United States District Court's original jurisdiction of any civil action authorized by law to be commenced by any person to redress the deprivation under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege of immunity secured by the said Constitution; and under Title 28, United States Code,

Section 2201, providing for the rendition of declaratory judgments by the said courts.

2. Plaintiff is and was at all times hereinafter mentioned a corporation organized and existing under the laws of the State of Tennessee, and is and was at all times hereinafter mentioned duly authorized under the laws of the State of Kentucky to transact business in said latter State. At all times hereinafter mentioned, plaintiff owned and operated, and now owns and operates, at Paducah, Kentucky, a place of business for the exhibition and/or sale of motion picture films, video tapes, and video cassettes, books, magazines and other materials of like nature, known as "Tammy's Book Store."

3. The defendant City of Paducah is a municipal corporation of the State of Kentucky of the second class,

organized and operating under the city manager form of government. The defendant, John K. Penrod, is the Mayor of said City of Paducah, and the defendants, Joe Viterisi, Robert A. Coleman, Harold (Shorty) Ford and James W. Flynn are its Commissioners, and together said Mayor and Commissioners constitute the Board of Commissioners, which is the legislative body of said city. The defendant, James W. Utter is Corporation Counsel of said city, and the defendant, Thurman Baker is its Treasurer.

4. On June 14, 1983, the said Board of Commissioners enacted an ordinance designated as Ordinance No. 83-6-2388, a copy of which is annexed to this complaint part thereof as Exhibit "A" thereto; and on July 13, 1983, the defendant, Utter, as Corporation Counsel aforesaid notified plaintiff in writing of the intention of the defendant, City

of Paducah, to institute proceedings against plaintiff under said ordinance. A copy of said notice is annexed to this complaint as part thereof as Exhibit "B" thereto. Thereafter, the date of the hearing before the Board of Commissioners mentioned in said notice was amended to August 3, 1983, and said hearing is to be held on that date.

5. The aforesaid ordinance is unconstitutional, invalid, unenforceable, null and void, both on its face and as applied to plaintiff, as violative of the Constitution of the United States and the First and Fourteenth amendments thereto, and of the rights of the plaintiff under said Constitution and said Amendments, in that the provisions of said ordinance and the enforcement procedures set forth therein constitute an unconstitutional prior restraining upon the exhibition

and distribution of literary and pictorial matter protected therefrom by the First and Fourteenth Amendments to the Constitution of the United States, and a deprivation of plaintiff's rights, liberty and property without due process of law.

6. Unless enjoined and restrained therefrom by this Court, defendants will continue to proceed against plaintiff under the provisions and procedures of said unconstitutional ordinance, will impose unconstitutional prior restraint upon its exhibition and distribution of said protected materials, and will deprive plaintiff of its constitutionally protected rights, liberty and property without due process of law, all in violation of plaintiff's constitutional rights. As a result, plaintiff will suffer immediate and irreparable injury, loss and damage therefrom, to redress which plaintiff

has no adequate remedy at law and therefore seeks equitable relief by way of injunction.

7. An actual controversy within the jurisdiction of this Court exists between plaintiff and defendants, in that plaintiff contends that said ordinance and all provisions thereof and procedures prescribed thereby are invalid, unconstitutional, unenforceable, null and void, both on their face and as applied to plaintiff, whereas defendants contend the contrary.

WHEREFORE, plaintiff demands (1) a declaratory judgment to the effect that said ordinance is unconstitutional and unenforceable; (2) that defendants be permanently and perpetually enjoined and restrained from proceeding against plaintiff under said ordinance or any

provision thereof; and (3) the recovery of its costs.

Joseph S. Freeland
FREELAND, GLANVILLE & MEGIBOW
910 Citizens' Bank Building
Paducah, Kentucky 42001
Attorney for Plaintiff
(502) 442-0121

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH
Civil Action File No. C83-0208-P(J)

INVESTMENT ENTERTAINMENT, INC.	)	
PLAINTIFF	)	
VS.	)	AMENDED COMPLAINT
CITY OF PADUCAH, ET AL.	)	
DEFENDANTS	)	

Plaintiff, Investment Entertainment, Inc., amends its complaint before service of any responsive pleading by any of the defendants, and for amendment adds thereto the following averments:

1. On August 3, 1983, the defendants Penrod, as Mayor, and Viterisi, Coleman, Ford, Flynn, as Commissioners, constituting the Board of Commissioners of the defendant City of Paducah, adopted a resolution of the said Board, a copy of which is annexed

hereto and made a part of this amended complaint as Exhibit "C" thereto.

2. On August 5, 1983, the defendant Utter, as Corporation Counsel of said defendant city, issued and caused to be served upon plaintiff, together with a certified copy of said resolution and a certified copy of the ordinance mentioned in the complaint, a written notice, a copy of which is annexed hereto and made a part of this amended complaint as Exhibit "D" thereto.

3. Unless enjoined and restrained therefrom by this Court, the defendants will proceed to carry said resolution into effect, and to enforce its provisions against plaintiff in violation and deprivation of plaintiff's rights under the Constitution of the United States and the First and Fourteenth Amendments thereto.

4. The said resolution is unconstitutional, invald, enforceable, null and void, both on its face and as applied to plaintiff, as violative of the Constitution of the United States and the First and Fourteenth Amendments thereto, and of the rights of the plaintiff under said Constitution and said Amendments, in the following respects:

(a) The provisions thereof and the procedures set forth therein constitute unconstitutional prior restraint upon the exhibition and distribution of literary and pictorial matter protected therefrom by said constitution and said Amendments.

(b) The finding of the Board of Commissioners that the video tapes and magazines referred to in said resolution are obscene is not supported by evidence.

(c) The finding of the Board of Commissioners, based upon viewing two video tapes and perusing two magazines, that plaintiff's business is a public nuisance and that all materials obssessed by it constitute a public nuisance, is not supported by evidence, and is irrational.

(d) The attempted revocation of plaintiff's business licenses, the attempted imposition of costs, the attempted imposition of a lien against plaintiff's property, and the attempts forfeiture of plaintiff's business receipts, all as provided by the provisions of said resolution, constitute a deprivation of plaintiff's property without due process of law.

5. The attempted enforcement of the provisions of said resolution against plaintiff by defendants threatens plaintiff with immediate and

irreparable injury, loss and damage therefrom, to redress which plaintiff has no adequate remedy at law and therefore seeks equitable relief by way of injunction.

6. An actual controversy within the jurisidction of this Court exists between plaintiff and defendants, in that plaintiff contends that said resolution and all provisions thereof and procedures prescribed thereby are unconstitutional, invalid, unenforceable, null and void, both on their face and as applied to plaintiff, whereas defendants contend the contrary.

WHEREFORE, plaintiff demands (1) a declaratory judgment to the effect that said resolution is unconstitutional and unenforceable; (2) that defendants be permanently and perpetually enjoined and restrained from proceeding against plaintiff under said resolution or any

provision thereof; (3) the relief demanded by its original complaint; and (4) the recovery of its costs.

Joseph S. Freeland
FREELAND, GLANVILLE & MEGIBOW
910 Citizens' Bank Building
Paducah, Kentucky 42001
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on August 10, 1983, I mailed a copy of the foregoing amended complaint and annexed exhibits to each of the following named defendants at their respective last known addresses: City of Paducah, P.O. Box 2267, Paducah, Kentucky 42001; John K. Penrod, 814 Bellevue Drive, Paducah, Kentucky 42001; Joe Viterisi, 950 Park Avenue, Paducah, Kentucky 42001; Robert A. Coleman, 639 North 23rd Street, Paducah, Kentucky 42110; Harold Ford, 195 Idlewild Drive, Paducah, Kentucky

42001; James W. Flynn, 1118 Jefferson Street, Paducah, Kentucky 42001; James W. Utter, P.O. Box 2267, Paducah, Kentucky 42001; and Thurman Baker, P.O.Box 2267, Paducah, Kentucky 42001.

Attorney for Plaintiff

APPENDIX "F"

Complaint and Petition for Temporary and Permanent Injunction filed by the City of Paducah on August 10, 1986 in the McCracken Circuit Court.

(Reference: Petition for Writ of Certiorari at page 16, line 9).

....F-1 thru F-12

McCRACKEN CIRCUIT COURT
CIVIL ACTION NO. 83-CI-
DIVISION NO.

CITY OF PADUCAH	)	
	)	
PLAINTIFF,	)	COMPLAINT
	)	AND PET-
VS.	)	ITION FOR
	)	TEMPORARY
INVESTMENT ENTERTAINMENT,	)	AND PER-
INC. Serve: James L.	)	MANENT
Lindblad, Citizens Bank	)	INJUNCT-
Building, Paducah,	)	ION
KY 42001, Statutory Agent	)	
	)	
DEFENDANT.	)	

Comes the City of Paducah and for its complaint and petition for temporary and permanent injunction against the defendant states as follows:

1. The plaintiff, City of Paducah, is a city of the second class, possessing all powers conferred upon cities of the second class by the statutes of the Commonwealth of Kentucky and under the general powers of city of the second class under the statutes of the Commonwealth of Kentucky, the City

of Paducah has the power to declare the existence of public nuisances within the City of Paducah.

2. The defendant, Investment Entertainment, Inc., is a corporation which is incorporated under the laws of the Commonwealth of Kentucky with its principle place of business being Citizens Bank Building, Paducah, Kentucky.

3. Investment Entertainment, Inc., is the owner of real estate known as 243 Brown Street, Paducah, Kentucky, more particularly described as follows:

> Beginning on the south side of Brown Street at a tack a distance of 94.32 feet in a westerly direction from a southwest intersection of Brown Street and Beltline Highway (now Irvin Cobb Drive); thence at a right angle in a southerly direction a distance of 125 feet to an iron pipe; thence at a right angle in a westerly direction a distance of 50 feet to an iron rod; thence at a right angle in a northerly direction a distance of 125 feet to an iron rod on the south line of Brown Street;

thence with the south line of Brown Street at a right angle a distance of 50 feet in an easterly direction to the point of beginning.

Being the same property in all respects that was conveyed to Investment Entertainment, Inc. by deed dated the 21st day of March, 1983, and recorded in Deed Book 653, Page 239, in the McCracken County Court Clerk's Office.

4. The defendant, Investment Entertainment, Inc., operates a business at 243 Brown Street, Paducah, Kentucky, known as Tammy's Book Store.

5. On April 8, 1983, Investment Entertainment, Inc., David Capps, president, applied for and received a 1983 business license for retail sales within the City of Paducah.

6. On April 8, 1983, Investment Entertainment, Inc., David Capps, president, applied for and received a business license for an amusement business at 243 Brown Street, Paducah, Kentucky, known as Tammy's Book Store.

7. On June 14, 1983, the Board of Commissioners adopted Ordinance No. 83-6-2388 which declares the commercial exploitation of obscene motion picture films (as defined in the ordinance) and obscene publications to be contrary to the public health, safety and general welfare and a public nuisance, and declaring a place displaying or exhibiting such obscene motion picture films or publications to be a public nuisance per se; making all obscene matter and publications in such place a public nuisance per se; providing for notice and legal proceedings to abate the same and providing a procedure for assessment and the collection of costs of abatement. A copy of said ordinance is attached hereto and made a part hereof as if set out in full. (See exhibit A.)

8. On the 22nd day of June, 1983, a police officer of the City of Paducah visited the business known as Tammy's Book Store, which is operated by Investment Entertainment, Inc. located at 243 Brown Street, Paducah, Kentucky, and observed the display for sale of materials which appeared to the officer to be in violation of the Ordinance No. 83-6-2388 of the City of Paducah, declaring it a public nuisance to engage in the commercial exploitation of obscene motion picture films and obscene publications as defined in that ordinance.

9. On July 2, 1983, the same officer of the City of Paducah returned to the place of business known as Tammy's Book Store located at 243 Brown Street, Paducah, Kentucky, and purchased a video tape entitled "EROTIC INTERLUDE" and a magazine entitled "BACK DOOR NUMBER TWO".

10. On July 10, 1983, the same officer returned to Tammy's Book store at the above address, and again purchased a video tape entitled, "THE FILTHY RICH" and a magazine entitled, "MR/MRS".

11. On August 3, 1983, the Board of Commissioners of the City of Paducah conducted a hearing, pursuant to the ordinance, 83-6-2388, and after reviewing the magazines in their entirety and the video tapes, "EROTIC INTERLUDE" and "THE FILTHY RICH", in their entirety, adopted a Resolution which is attached hereto and made a part hereof as if set out in full as exhibit B hereto.

12. Said Resolution pursuant to the above referenced ordinance, found that the business known as Tammy's Book Store and operated by Investment Entertainment, Inc., to be a public

nuisance and the commercial exploitation of obscene material and ordered the revocation of all licenses and permits issued by the City of Paducah to Tammy's Book Store and/or Investment Entertainment, Inc., subject to confirmation by McCracken Circuit Court in a judicial proceeding to be filed therein.

13. Pursuant to Ordinance 83-6-2388, particularly Section 19-154, on August 5, 1983, the corporation statutory agent, their attorney, their general manager or person in charge of the premises and all employees thereof were served with a copy of the Ordinance No. 83-6-2388, the Resolution adopted by the Board of Commissioners on August 3, 1983, and a letter from the Corporation Counsel of the City of Paducah advising them of findings of the Board of Commissioners and the effect of said

ordinance and resolution, a copy of which said letter is attached hereto as exhibit C.

14. Section 19-153 of Ordinance 83-6-2388, declares the following to be nuisances per se:

(A) Any and every place of business in the City of Paducah in which obscene publications constitute all of the stock in trade, or a principal part thereof. Where such obscene publications constitute only a part of the stock in trade and are located in a place or places within such business which are capable of demarcation, such place or places constitute the public nuisance which requires abatement; and

(B) Any and every obscene publication possessed at a place which is a public nuisance under this Section.

From and after service on the place, or its manager, or acting

manager, or person then in charge of such place, of a certified copy of this ordinance and a certified copy of the resolution provided for herein, all valuable consideration received for the sale of such obscene publications shall be regarded as being a public nuisance per accidens, as personal property used in conducting and maintaining a declared public nuisance, as to which forfeiture will be requested in the judicial proceedings required herein.

WHEREFORE, the City of Paducah demands that the Court find that the subject matter identified by the Board of Commissioners in said Resolution is obscene as defined within Ordinance 83-6-2388, that each place named by the Board of Commissioners is a public nuisance and that the action taken by the Board of Commissioners to revoke the licenses issued to that place of

business was unlawful; enter an injunction both temporary and permanent, restraining all persons maintaining said nuisance from possessing or publicly exhibited said obscene motion picture films, as defined in the ordinance, or from selling or possessing for sale said obscene publications at any time in the future in the City of Paducah, and such other injunctive relief as the court may order; and order that all positive prints of said obscene films and all said obscene publication or copies or reproductions thereof, be forfeited as contraband, order an accounting of all monies paid as admission price to the exhibition or exhibitions of said obscene motion picture films (as defined within said ordinance) and valuable consideration received for the sale of such obscene publication from and after 10:00 o'clock a.m. August 5, 1983, at

which time the person or persons maintained of said nuisance received a copy of the Resolution of the Board of Commissioners finding that a public nuisance existed and grant to the City of Paducah a judgment that such monies are again derived from wrongful acts and a public nuisance; order that all admission price monies or valuable consideration received and any money in the court order accounting, be forfeitured as required by law to the City of Paducah; grant to the City of Paducah, a judgment for all costs expended in abating the public nuisance including investigation costs, court

costs, reasonable attorneys fees, and such other expenses provided for herein and all relief to which the court may deem proper.

James W. Utter
Attorney at Law
P.O. Box 2267-
City Hall
Paducah, KY 42001

ATTORNEY FOR
DEFENDANT

APPENDIX "G"

Answer of the City of Paducah to Complaint in the United States District Court For The Western District Of Kentucky at Paducah, entitled "Investment Entertainment, Inc. v. City of Paducah, et al.," Civil Action File No. C83-0208P(J).

(Reference: Petition for Writ of Certiorari at page 4, line 3; page 16, line 20; page 45, line 1.

....G-1 thru G-5

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH
CIVIL ACTION FILE NO. 83-0208-P(J)

INVESTMENT ENTERTAINMENT, INC.	)	
	)	
PLAINTIFF,	)	ANSWER
	)	
VS.	)	
	)	
CITY OF PADUCAH, ET AL	)	
	)	
DEFENDANT.	)	

Come the defendants and for their answer to the complaint state as follows:

FIRST DEFENSE

The complaint and amended complaint fail to state a claim upon which relief can be granted.

SECOND DEFENSE

As to the complaint, the defendants admit the allegations contained in paragraphs 1, 2, 3, 4, 7, and so much of paragraph 6 which states that "unless enjoined and restrained therefrom by this court, the defendants will continue

to proceed against the plaintiff under the provisions and procedures of said ordinance". Defendants deny the allegations contained in paragraph 5, the remaining allegations in paragraph 6 including the unconstitutionality of the ordinance: the defendants deny each and every other allegation of the complaint not specifically admitted.

THIRD DEFENSE

As to the amended complaint, the defendants admit the allegations contained in paragraphs 1, 2, 6, and so much of paragraph 3 which states that the defendants will carry said resolution into effect and enforce its provisions against plaintiff: defendants deny the remaining allegations in paragraph 3, paragraph 4 in its entirety, and paragraph 6: defendants deny each and every other allegation of the amended complaint not

specifically admitted herein.

FOURTH DEFENSE

There is presently pending in McCracken Circuit Court, Civil Action No. 83-CI-590, styled City of Paducah vs. Investment Entertainment, Inc. and in which suit the state courts will make a determination of the law applicable on the subject matter of this suit pending in Federal District Court, and the Federal District Court should abstain from further proceeding in this action until a final determination is made on the merits and the action filed in the McCracken Circuit Court.

FIFTH DEFENSE

The Ordinance, No. 83-6-2388, attached as exhibit "A" to the complaint is constitutional in its entirety and is applied to this defendant in that no prior restraint exist under the ordinance, and a court review of the

material is required before any licenses would be revoked by the city of Paducah, and all hearings by the Board of Commissioners of the City of Paducah and court proceedings under said ordinance only apply to an existing business which deals in obscenity as defined by said ordinance, which definition substantially complies with the permissible regulations under the first amendment to the constitution of the United States.

WHEREFORE, the defendants demand that the complaint and amended complaint against them be dismissed, that they recover their costs herein expended and all other relief to which they may appear entitled.

James W. Utter
Corporation Counsel
P.O. Box 2267
Paducah, KY 42001
ATTORNEY FOR
DEFENDANTS

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was mailed, postage prepaid, on this 15th day of August, 1983, to: Hon. Joseph S. Freeland, Freeland, Glanville & Megibow, 910 Citizens Bank Building, Paducah, KY 42001, attorney for Investment Entertainment, Inc.

James W. Utter

APPENDIX "H"

1. Motion for Summary Judgment of Investment Entertainment, Inc. in Civil Action No. C83-0208P(J) filed February 2, 1984.

(Reference: Petition for Writ of Certiorari at page 18, line 18).

....H-1 thru H-5

2. Motion for Summary Judgment of City of Paducah in Civil Action No. C83-0217P(J) consolidated with No. 83-0208P(J), filed March 9, 1984.

....H-6 thru H-8

3. Motion for Summary Judgment of Beltline News and Arcade Club, Inc., in Civil Action No. C83-0237-P(J), filed Feb. 1, 1984.

....H-9 thru H-14

4. Motion for Summary Judgment of City of Paducah in Civil Action No. C83-0237P(J), filed March 9, 1984.

....H-15 thru H-16

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH
Civil Action File No. C83-0208-P(J)

INVESTMENT ENTERTAINMENT, INC.	)	
	)	
PLAINTIFF,	)	MOTION
	)	FOR
VS.	)	SUMMARY
	)	JUDG-
CITY OF PADUCAH, ET AL.	)	MENT
	)	
DEFENDANTS.	)	

Plaintiff, Investment Entertainment, Inc., moves the Court for the entry of a summary judgment for the relief demanded in its complaint and amended complaint, upon the ground that the pleadings (including the exhibits thereto) and the annexed affidavit (including the exhibit thereto) show that there is no genuine issue as to any

material fact, and that plaintiff is entitled to such judgment as a matter of law.

Joseph S. Freeland
FREELAND, GLANVILLE & MEGIBOW
910 Citizens' Bank Building
Paducah, KY 42001
Attorney for Plaintiff
(502) 442-0121

AFFIDAVIT

STATE OF KENTUCKY)
) Sct.
COUNTY OF McCRACKEN)

The affiant, Joseph S. Freeland, being duly sworn, deposes upon oath as follows:

1. Affiant is 68 years of age, is and has been continuously for the past 45 years a regularly licensed and practicing attorney at law at Paducah, Kentucky, is the attorney for the plaintiff, Investment Entertainment,

Inc., in this action, and has been plaintiff's counsel continuously since some time in May, 1983.

2. Affiant makes this affidavit on his own personal knowledge, and is competent to testify to the matters stated therein.

3. The pleadings in this action, together with all exhibits thereto, are made a part of this affidavit by reference, to the same extent as if copied in full therein.

4. Affiant personally attended and was present at, and during the entirety of, the hearing conducted by the Board of Commissioners of the defendant City of Paducah on August 3, 1983, at the time of the adoption by said Board of the resolution annexed as Exhibit "C" to plaintiff's amended complaint, and personally saw and heard all that transpired at said hearing.

5. Said hearing was stenographically reported, at the instance of the defendants, by Shirley B. France, a stenographic reporter and Notary Public, who thereafter transcribed here stenographic notes taken at said hearing upon the typewriter. A copy of said transcript of said hearing is annexed hereto and made a part hereof as Exhibit No. 1.

6. Affiant knows of his own personal knowledge that said transcript is a full, correct and complete report of all proceedings had by and before said Board at said hearing of August 3, 1983.

And further affiant sayeth not.

_____

Joseph S. Freeland

Subscribed and sworn to before me by Joseph S. Freeland this 2nd day of February, 1984. My commission as Notary Public will expire August 12, 1987.

_____
Notary Public, State
of Kentucky at Large

CERTIFICATE OF SERVICE

I hereby certify that on February 2, 1984, I mailed a copy of the foregoing motion and affidavit to Hon. James W. Utter, defendants' attorney, at his last known address, P.O. Box 2267, Paducah, Kentucky 42001.

_____
Attorney for
Plaintiff

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CITY OF PADUCAH	)	
	)	
vs.	)	Civil Action
	)	No. 83-0217
INVESTMENT ENTERTAIN-	)	P(J)
MENT, INC. and SHOW-	)	
TIME ENTERTAINMENT,	)	
INC.	)	
	)	
CONSOLIDATED WITH:	)	MOTION FOR
	)	SUMMARY
INVESTMENT ENTERTAIN-	)	JUDGMENT
MENT, INC.	)	
	)	
vs.	)	Civil Action
	)	No. 83-0208
CITY OF PADUCAH, ET	)	P(J)
AL.	)	

Comes the City of Paducah and moves the Court for Judgment pursuant to Rule 56(c) of the Federal Rules of Civil Procedure, in that the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact in that the City of Paducah is entitled to a judgment as a matter of law.

The City of Paducah herein files its Memorandum in Support of said Motion.

James W. Utter
P.O. Box 2267
Paducah, KY 42001

Attorney for
City of Paducah

NOTICE

This Motion is being submitted pursuant to the Order of the Court of February 14, 1984.

James W. Utter

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was mailed to the Hon. Joseph Freeland, Citizens Bank Building, Paducah, KY 42001, attorney for Investment Entertainment, Inc. and Showtime Entertainment, Inc., on this 8th day of March, 1984.

James W. Utter

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH
Civil Action File No. C83-0237-P(J)

BELTLINE NEWS & ARCADE CLUB, INC.	)	
PLAINTIFF,	)	MOTION FOR SUMMARY JUDGMENT
VS.	)	
CITY OF PADUCAH, ET AL	)	
DEFENDANT.	)	

Plaintiff, Beltline News & Arcade Club, Inc., moves the Court for the entry of a summary judgment for the relief demanded in its complaint and amended complaint, upon the ground that the pleadings (including the exhibits thereto) and the annexed affidavit (including the exhibits thereto) show

that there is no genuine issue as to any material fact, and that plaintiff is entitled to such judgment as a matter of law.

Joseph S. Freeland
FREELAND, GLANVILLE
& MEGIBOW
910 Citizens' Bank
Building
Paducah, KY 42001
Attorney for
Plaintiff
(502) 442-0121

AFFIDAVIT

STATE OF KENTUCKY)
) Sct.
COUNTY OF McCRACKEN)

The affiant, Joseph S. Freeland, being duly sworn, deposes upon oath as follows:

1. Affiant is 68 years of age, is and has been continuously for the past 45 years a regularly licensed and practicing attorney at law at Paducah,

Kentucky, is the attorney for the plaintiff, Beltline News & Arcade Club, Inc., and has been plaintiff's counsel and registered process agent continuously since plaintiff was organized as a non-stock, non-profit corporation under the laws of the State of Kentucky in April, 1982.

2. Affiant makes this affidavit on his own personal knowledge, and is competent to testify to the matters stated therein.

3. A certified copy of plaintiff's articles of incorporation is annexed hereto as Exhibit No.1, and is made a part hereof.

4. The pleadings is this action, together with all exhibits thereto, are made a part of this affidavit by reference, to the same extent as if copied in full herein.

5. Affiant personally attended and was present at, and during the entirety of, the hearing conducted by the Board of Commissioners of the defendant City of Paducah on September 2, 1983, at the time of the adoption by said Board of the resolution annexed as Exhibit "C" to plaintiff's amended complaint, and personally saw and heard all that transpired at said hearing.

6. Said hearing was stenographically reported, at the instance of the defendants, by Lisa A. Kellough (now Lisa A. Dapp), who was and is the official stenographic reporter for Division No. 2 of the McCracken Circuit Court, and who thereafter transcribed her stenographic notes taken at said hearing upon the typewriter. A copy of said transcript of said hearing is annexed hereto and made a part hereof as Exhibit No. 2.

7. Affiant knows of his own personal knowledge that said transcript is a full, correct and complete report of all proceedings had by and before said Board at said hearing of September 2, 1983.

And further affiant sayeth not.

Joseph S. Freeland

Subscribed and sworn to before me by Joseph S. Freeland this 1st day of February, 1984. My commission as Notary Public will expire August 12, 1987.

Notary Public, State of Kentucky at Large

Certificate of Service

I hereby certify that on February 1, 1984, I mailed a copy of the foregoing motion and affidavit to Hon. James W. Utter, defendants' attorney, at his last known address, P.O. Box 2267, Paducah, Kentucky 42001

Attorney for
Plaintiff

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

BELTLINE NEWS & ARCADE CLUB, INC.	)	MOTION FOR SUMMARY JUDGMENT
PLAINTIFF,	)	
VS.	)	Civil Action No. 83-0237 P(J)
CITY OF PADUCAH	)	
DEFENDANTS.	)	

Comes the City of Paducah and moves the Court for Judgment pursuant to Rule 56(c) of the Federal Rules of Civil Procedure, in that the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact in that the City of Paducah is entitled to a judgment as a matter of law.

The City of Paducah herein files its Memorandum in Support of said Motion.

James W. Utter
P.O. Box 2267
Paducah, KY 42001

Attorney for
City of Paducah

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was mailed to the Hon. Joseph Freeland, Citizens Bank Building, Paducah, KY 42001, attorney for Beltline News & Arcade Club, Inc., on this 8th day of March, 1984.

James W. Utter

APPENDIX "I"

MEMORANDUM IN SUPPORT OF CITY OF PADUCAH

MOTION FOR SUMMARY JUDGMENT

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CITY OF PADUCAH

VS. Civil Action No. 83-0217 P(J)

INVESTMENT ENTERTAINMENT, INC.
and SHOWTIME ENTERTAINMENT, INC.

CONSOLIDATED WITH:

INVESTMENT ENTERTAINMENT, INC.

VS. Civil Action No. 783-0208 P(J)

CITY OF PADUCAH, ET AL

MEMORANDUM IN SUPPORT OF CITY OF PADUCAH
MOTION FOR SUMMARY JUDGMENT

Comes the City of Paducah and herein files its Memorandum in Support of its Motion for Summary Judgment:

MAY IT PLEASE THE COURT:

KRS 531.020(1) "A person is guilty of distribution of obscene matter when, having knowledge of its content and character, he:

(a) Sends or causes to be sent into this state for sale of distribution; or

(b) Brings or causes to be brought into this state for sale or distribution; or

(c) In this state, he:

1. Prepares, or
2. Publishes, or
3. Prints, or
4. Exhibits, or
5. Distributes, or

6. Offers to distribute, or
7. Has in his possession with intent to distribute, exhibit or offer to distribute, any obscene matter.

(2) Distribution of obscene matter is a Class B Misdemeanor unless the defendant has in his possession more than one unit of material coming within the provisions of this Chapter, in which case it shall be a Class A Misdemeanor".

In 1974 the Kentucky Courts held that an injunction is a permissible tool to be used against persons violating the then penal statute regulating obscene matter. See Hall v. Commissioner ex rel. Schroering (1974), 505 S.W.2d 166.

Distributing obscene matter within the Commonwealth of Kentucky, is illegal.

> KRS 82.082 states, "(1) A city may exercise any power and perform any function within its boundaries, including the power of eminent domain in accordance with provision of the Eminent Domain Act of Kentucky, that is in furtherance of a public purpose of the city and not in conflict with a constitutional provision of statute." "(2) A power or function is in conflict with a statute if it is expressly prohibited by statute or there is a comprehensive scheme of legislation on the same general subject embodied in the Kentucky Revised Statutes including, but not limited to, the provisions of Chapters 90 and 96." (Emphasis ours).

There is not a comprehensive scheme regulating pornography in the Kentucky Revised Statutes, and the Kentucky Penal Code sections do not preempt the City of Paducah from regulating pornography.

In furtherance of a public purpose the City of Paducah adopted Ordinance No. 83-6-2388 (hereinafter referred to as ordinance) declaring the commercial exploitation of obscene motion picture films and obscene publications to be contrary to the public health, safety and general welfare, and a public nuisance; declaring any place displaying or exhibiting such obscene motion picture films or publications to be a public nuisance per se; making all obscene matter and publications possessed in such places a public nuisance per se; and providing for notice and legal proceedings to abate the same; and providing a procedure for assessment and collection of costs of abatement. (See Exhibit "A", Complaint in file C83-0208-P(J)).

In response to City adopting the above referred ordinance and sending a notice to Investment Entertainment, Inc. that it was under investigation for being in violation of said ordinance (see Exhibit "B" of Investment Entertainment, Inc. Complaint,) Investment Entertainment filed a Complaint in this Court asking for a Declaratory Judgment declaring the Padcah ordinance to be unconstitutional and restraining

the City from proceeding against Investment Entertainment under said ordinance.

Pursuant to said ordinance the City of Paducah conducted a hearing, after which a resolution was adopted by the Board of Commissioners (see Exhibit "C" to Amended Complaint of Investment Entertainment, Inc.) and notified Investment Entertainment, Inc. of the findings of the Board of Commissioners (see Exhibit "D" to Amended Complaint of Investment Entertainment, Inc.).

Investment Entertainment and Showtime admit that the material viewed by the Board of Commissioners is obsence. (Memorandum of plaintiff, page 5).

The ordinance adopted by the City of Paducah is based upon an ordinance upheld in People ex rel. Camil v. Buena Vista Cinema, 57 Cal. App. 3d page 497, 129 Cal. Rptr. 315, (1976). Additionally this ordinance is the similar to the ordinance which was upheld by the United States District Court, Western District of Pennsylvania in Eastern Books v. Bagnoni, 446 F. Supp. 643 (1978) and a similar scheme was upheld in State ex rel. Kidwell v. U.S. Marketing, Idaho, 631 P. 2d 622 (1981).

Section 19-150 of Ordinance No. 83-6-2388 states that the ordinance "establishes procedures for abatement" of the public nuisance, "and for the assessment and collection of costs of abatement which may be incurred by the City incident to such abatement".

The ordinance provides for judicial review prior to any revocation of licenses, placement of liens, or other activity which would interfere with the business activity of the plaintiff. See Section 19-155 (d). Sub-section (g) of Section 19-155 requires notice to be given to the parties involved in the findings of the Board of Commissioners and the proceedings which will be taken to abate the public nuisance.

The judicial proceedings associated with the City of Paducah's ordinance, prior to any activity on behalf of the City to actually close the business or invoke remaining sections of the ordinances, fully protects the rights of the plaintiff to due process, including a judicial determination of obscentity of their materials and does not prohibit the distribution of protected material under the Constitution of the United States or the laws of the Commonwealth of

Kentucky.

On page 3 of their Memorandum, the plaintiff states that the City attempts to impose a lien upon real property of the affected business for all costs, the amount of which is to be determined, not by the court, but by the Board, and provides for the collection of such assessment as other City taxes are collected. This lien is not assessed until a court review has taken place along with the review of the entire proceedings. This provision is not arbitrary or capricious and is subject to court review prior to a lien attaching or other collection efforts by the City.

Plaintiff further takes the position that Section 6 of the Resolution of the Board of Commissioners is unreasonable and violates the Constitutional requirements of due process. Plaintiff is mistaken that Section 6 of the Resolution is unreasonable. Sections 19-152 and 153 of the ordinance set the perimeter for what material constitutes a public nuisance and it will be a duty upon the City, at a hearing before the court, to demonstrate that Sub-sections (A) and (B) of Section 19-153 of the

ordinance exist and that obscene publications constitute all or a prcinciple part of the stock or trade of said business.

In summary, the ordinance is designed to give the City a mechanism for determining when the City will insitute judicial proceedings to abate a public nuisance. In order for the City to prevail before the trial court it will be necessary for the City to show that the conditions set forth in Sections 19-152 and 19-153 exist.

Respectfully submitted,

/s/ James W. Utter
James W. Utter
Attorney at Law
P.O. Box 2267
Paducah, KY 42001
ATTORNEY FOR CITY OF PADUCAH

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Motion was mailed, postage prepaid, on this the 8th day of March, 1984 to: Hon. Joseph S. Freeland, Suite 910 Citizens Bank Building, Paducah, KY 42001.

/s/ James W. Utter
James W. Utter

APPENDIX "J"

BRIEF FOR CITY OF PADUCAH, JOE VITERISI
AS MAYOR of the CITY OF PADUCAH,
P.J. GRUMLEY, ROBERT A COLEMAN,
HAROLD (SHORTY) FORD and HAL COLE,
JAMES W. UTTER as CORPORATE COUNSEL;
and THURMAN BAKER as TREASURER Thereof

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
NOS. 85-5092/93

CITY OF PADUCAH — PLAINTIFF/APPELLANT

VS.

INVESTMENT ENTERTAINMENT, INC. ET AL — DEFENDANTS/APPELLEES

INVESTMENT ENTERTAINMENT, INC. (85-5092)
BELTLINE NEWS AND ARCADE CLUB (85-5093) — PLAINTIFFS/APPELLEES

VS.

CITY OF PADUCAH, ET AL — DEFENDANTS/APPELLANTS

On appeal from the United States
District Court for the Western
District of Kentucky
at Paducah

BRIEF FOR CITY OF PADUCAH, JOE VITERISI AS MAYOR of the CITY OF PADUCAH, P.J. GRUMLEY, ROBERT A. COLEMAN, HAROLD (SHORTY) FORD and HAL COLE, JAMES W. UTTER as CORPORATE COUNSEL; and THURMAN BAKER as TREASURER Thereof

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For the convenience of the Court in citing references to the record, the following procedure shall be used: Investment Entertainment, Inc. v. City of Paducah, Civil Action No. C83-0208-P(J) below, referred to as Investment; City of Paducah

v. Investment Entertainment, Inc., Civil Action No. C83-0217-P(J) below, shall be cited as City and Beltline News and Arcade Club v. City of Paducah, Civil Action No. C83-0237-P(J) below, shall be cited as Beltline.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

Is City of Paducah Ordinance No. 83-6-2388 at Sections 19-152 and 19-153 unconsitutuional by declaring any and every place in the City of Paducah where obscene films are publicly exhibited as a regular course of business, or possessed for the purpose of such exhibition; or any and every place in the City of Paducah where obscene film is publicly and repeatedly exhibited or possessed for such purpose of exhibition a public nuisance; and declaring every obscene film which is publicly exhibited or possessed for such purpose at a place which is a public nuisance under this Section to be public nuisances per se.

STATEMENT OF THE CASE

On June 14, 1983, the Board of Commissioners of the City of Paducah adopted Ordinance No. 83-6-2388 "DECLARING THE COMMERCIAL EXPLOITATION OF OBSCENE MOTION PICTURE FILMS AND OBSCENE PUBLICATIONS

TO BE CONTRARY TO THE PUBLIC HEALTH, SAFETY AND GENERAL WELFARE, AND A PUBLIC NUISANCE; DECLARING ANY PLACE DISPLAYING OR EXHIBITING SUCH OBSCENE MOTION PICTURE FILMS OR PUBLICATIONS TO BE A PUBLIC NUISANCE PER SE; MAKING ALL OBSCENE MATTER AND PUBLICATIONS POSSESSED IN SUCH PLACES A PUBLIC NUISANCE PER SE; PROVIDING FOR NOTICE AND LEGAL PROCEDURES TO ABATE THE SAME; AND PROVIDING A PROCEDURE FOR ASSESSMENT AND COLLECTION OF COSTS OF ABATEMENT." (Record - Investment Exhibit "A" to Complaint, pages 1-10; and Beltline Exhibit "A" to Complaint, pages 1-10)

In Section 19-150 of Ordinance No. 83-6-2388, the Board of Commissioners of the City of Paducah found that the

> "commercial exploitation of explicit sexual conduct through the public exhibition of obscene films and the sale of obscene publications, constitutes a debasement and distortion of a sensitive key relationship of human existence, central to family life, community welfare and development of human personality; that such exploitation is indecent and offensive to the senses and to the public morals and interferes with the interest of the public in the quality of life and total community environment, the tome of commerce in the City, property values, and public safety; and that the

> continuation of such activities is detrimental to the best health, safety, convenience, good morals, and general welfare of the City of Paducah and the residents, citizens, inhabitants, and business thereof, and is unlawful and may not be made a subject of a lawful license."

INVESTMENT ENTERTAINMENT, INC.

Pursuant to Section 19.955 of Ordinance No. 83-6-2388, the Board of Commissioners conducted a public hearing on August 3, 1983. The hearing was conducted after a letter was sent to Investment Entertainment, Inc., (hereinafter referred to as "Investment") informing them of the hearing. (Record - Investment: Complaint, Exhibit "B"). At the hearing the Board of Commissioners reviewed materials purchased from Investment by a police officer of the City of Paducah. After reviewing the materials purchased by the police officer the Board of Commissioners adopted a resolution finding that the materials were obscene under the ordinances of the City of Paducah and the statutes of the Commonwealth of Kentucky and that the place of business was operated by Investment. (Record - Investment: Amended Complaint, Exhibit "C").

The resolution further found that the business

is a public nuisance pursuant to Section 19-152 and 19-153 of the Ordinance and ordered the Corporation Counsel pursuant to Section 19-156 of the ordinance to instigate judical proceedings to abate the public nuisance.

Section 19-152 reads as follows:

> "The following are declared to be public nuisances per se:
>
> (a) Any and every place in the City of Paducah where obscene films are publicly exhibited as a regular course of business, or possessed for the purpose of such exhibition;
> (b) Any and every place in the City of Paducah where an obscene film is publicly and repeatedly exhibited, or possessed for the purpose of such exhibition; and
> (c) Any and every obscene film which is publicly exhibited or possessed for such purpose at a place which is a public nuisance under this section.
>
> "From and after service on the theater, or its manager, or acting manager, or person then in charge of such place, of a certified copy of this article and a certified copy of the resolution provided for herein, all monies paid thereafter as admission price to such exhibitions shall be regarded as being a public nuisance per accidens, as personal property used in conducting and maintaining a declared public nuisance as to which forfeiture will be requested in the judicial proceedings required herein.: (Record - Investment: Exhibit "A" to Complaint, p. 3-4).

Section 19-153 reads as follows:

"(a) The following are declared to be public nuisances per se:

(1) Any and every place of business in the City of Paducah in which obscene publications constitute all of the stock in trade, or a principal part thereof. Where such obscene publications consitute only a part of the stock in trade and are located in a place or places within such business which are capable of demarcation, such place or places consitute the public nuisance which requires abatement; and

(2) Any and every obscene publication possessed at a place which is a public nuisance under this section.

"(b) From and after service on the place or its manager, or action manager, or person then in charge of such place, of a certified copy of this article and a certified copy of the resolution provided for herein, all valuable consideration received for the sale of such obscene publications shall be regarded as being a public nuisance per accidens, as personal property used in conducting and maintaining a declared public nuisance, as to which forfeiture will be requested in the judical proceedings required herein." (Record - Investment: Exhibit "A" to Complaint, p. 4).

On the same day Investment filed a Complaint in the United States District Court for the Western District of Kentucky requesting the Court to issue an injunction prohibiting the City from enforcing Ordinance No. 83-6-2388, contending that portions

of said ordinance were unconstitutional. (Record - Investment: Complaint)

On August 10, 1983, the City of Paducah filed a complaint in the Circuit Court of McCracken County, Kentucky, asking the Circuit Court to determine that the business operated by Investment to be declared a public nuisance, and that an injunction, both temporary and permanent, restraining all persons from maintaining said public nuisance from possessing or publicly exhibiting obscene motion picture films, as defeind in the ordinance, or from selling or possessing for sale obscene publications at any time in the future in the City of Paducah, and such other injunctive relief as the Court may order, and that any obscene publications and obscene films be forefeited as contraband. (Record - City: Complaint).

On August 17, 1983, Investment filed a petition for removal to the United States District Court. On October 3, 1983, the District Court consolidated the two actions into Civil Action No. 83-0209P(J). (Record - Investment and City : Order dated 10-3-83).

BELTLINE NEWS AND ARCADE CLUB

As to the appellee Beltline, the proceedings were similar to Investment except that the District Court found that there was not diversity of citizenship and remanded the City's complaint against Beltline to the McCracken Circuit Court, where said action is still pending.

In both actions, all of the parties filed motions for summary judgment as to the constitutionality of ordinance No. 83-6-2388. On January 5, 1985, the Hon. Edward H. Johnstone, Judge of the United States District Court, entered a Memorandum Opinion in Investment Entertainment v. City of Paducah concluding that:

> "On the other hand, non-obscene materials are entitled to great protection, and therein lies the danger of Ordinance No. 83-6-2388. By going beyond the obscene materials themselves and focusing on the place where the obscene materials are sold or exhibited, the ordinance improperly intrudes upon protected expression. Because of the focus on places rather than materials, the Court finds that Section 19-152(A) and (B) and Section 19-153(A) are unconstitutional." (Record - Investment: Memorandum Opinion of 1-5-85, page 10).

A memorandum of opinion entered January 7, 1985, in Beltline referred to and adopted the memorandum opinion in the Investment case. (Record - Beltline: Memorandum Opinion of 1-3-85).

On January 7, 1985, the District Court entered the following Order:

> "For the reasons given in the memorandum opinion accompanying this order,
>
> "IT IS ORDERED that the motion for summary judgment filed by the plaintiff, Beltline News & Arcade Club, Inc., is SUSTAINED.
>
> "IT IS FURTHER ORDERED that
>
> "1. Sections 19-152 and 19-153 of Ordinance No. 83-6-2388 of the City of Paducah are declared to be in violation of the Constitution of the United States of American, and;
>
> "2. The defendants are permanently enjoined from utilizing the provisions of Sections 19-152 and 19-153, Ordinance No. 83-6-2388, to proceed against the plaintiff.
>
> "This is a final and appealable order and there is no just reason for delay."

On January 8, 1985, the District Court entered the following Order:

> "For the reasons given in the memorandum opinion accompanying this order,
>
> "IT IS ORDERED that the motion for summary judgment filed on behalf of Investment Entertainment, Inc. and Showtime Entertainment, Inc. is SUSTAINED.

"IT IS FURTHER ORDERED that

"1. Sections 19-152 and 19-153 of Ordinance No. 83-6-2388 of the City of Paducah are declared to be in violation of the Constitution of the United States of America, and;

"2. The defendants are permanently enjoined from utilizing the provisions of Sections 19-152 and 19-153, Ordinance No. 83-6-2388, to proceed against Investment Entertainment, Inc.

"This is a final and appealable order and there is no just reason for delay."

On January 29, 1985, the City of Paducah filed notices of appeal in both the Investment case and the Beltline case, which appeals were consolidated by Order of the United States Court of Appeals for the Sixth Circuit.

ARGUMENT

KRS 531.020(1) "A person is guilty of distribution of obscene matter when, having knowledge of its content and character, he:

(a) Sends or causes to be sent into this state for sale of distribution; or

(b) Brings or causes to be brought into this state for sale or distribution; or

(c) In this state, he:

1. Prepares, or
2. Publishes, or
3. Prints, or
4. Exhibits, or
5. Distributes, or
6. Offers to distribute, or
7. Has in his possession with intent to distribute, exhibit or offer to distribute, any obscene matter.

(2) Distribution of obscene matter is a Class B Misdemeanor unless the defendant has in his possession more than one unit of material coming within the provisions of this Chapter, in which case it shall be a Class A Misdemeanor".

Pornography is and has been illegal in the State of Kentucky, and it is not protected by the First Amendment to the Constitution of the United States of America. See Bantam Books, Inc. v. Sullivan, 372 U. S. 58, 83 S.Ct. 631 (1963). The problem of enforcing criminal statutes, the time involved in trials and appeals on criminal prosecutions, and the openness of businesses which deal in this illegal product are apparent.

In 1974 the Kentucky Court held that an injunction is a permissable tool to be used against in regulating obscene matter. See Hall v. Commonwealth ex rel. Schroering (1974), 505 S.W.2d 166.

In furtherance of such public purpose the City of Paducah adopted Ordinance No. 83-6-2388 (hereinafter referred to as ordinance) declaring the commercial exploitation of obscene motion picture films and obscene publications to be contrary to the public health, safety and general welfare, and a public nuisance; de-

any place displaying or exhibiting such obscene motion picture films or publications to be a public nuisance per se; making all obscene matter and publications possessed in such places a public nuisance per se; and providing for notice and legal proceedings to abate the same; and providing a procedure for assessment and collection of costs of abatement.

The City of Paducah needs a means of controlling illegal, obscene material within the city limits, and the ordinance in question goes no further than is necessary to control obscene material. To insure that only obscene material and distributors of such are involved, a review is held by the City Commission which consists of the elected officials of the city, and a cross-section of city residents. Additionally, their findings are not implemented in any manner against the alleged dealer or distributor of obscene material, but rather, a Circuit Court action if filed in which the Circuit Judge must find that the person regularly deals in obscene material and has a substantial portion in his stock and trade as obscene material. Only after judicial review are the sanctions of the ordinance implemented.

Investment and Beltline admit that the material viewed by the Board of Commissioners is obscene. (Record - Investment: Memorandum Opinion, p.5).

Section 19-150 of the Ordinance states that the ordinance "establishes procedures for abatement" of the public nuisance, "and for the assessment and collection of costs of abatement which may be incurred by the City incident to such abatement".

The ordinance provides for judicial review prior to any revocation of licenses, placement of liens, or other activity which would interfere with the business activity of the plaintiff. (Record - Investment: Exhibit "A" to Complaint, p. 7)

The judicial proceedings associated with the City of Paducah's ordinance, prior to any activity on behalf of the City to actually close the business or invoke the remaining sections of the ordinance, fully protect the rights of the plaintiff to due process, including a judicial determination of obscenity of their materials and does not prohibit the distribution of protected material under the Constitution of the United States or the laws of the Commonwealth of Kentucky. (Record - City: Memorandum Opinion, p. 6).

The procedure used by the City of Paducah has been upheld by the Supreme Court. The leading case of State ex rel. Kidwell v. U.S. Marketing, 631 P.2d 622 (Idaho, 1981), Appeal dismissed, U.S. Marketing, Inc. v. Idaho, (1982), 455 U.S. 1009, 71 L.Ed.2d 878, 102 S.Ct. 1649, the Idaho Court held that

> "While much has been written on procedural requirements in cases involving 'prior restraint,' very little has been written to define the phrase. To merely label something unconsitutional as a prior restraint is question begging at its best, especially if no analytical effort is made to determine whether the regulation is indeed a prior restraint on free speech.
>
> "...By way of example, if a book seller, having fallen behind on his property taxes, loses his bookstore at a tax sale, he will not be heard to complain that the state has imposed an unlawful prior restraint upon his book-selling activities. If the same book seller is convicted of the crime of distributing obscene materials, he may be imprisoned, and yet he will not be heard to complain that his incarceration constitutes a prior restraint upon his ability to disseminate protected speech, even though it is quite clear that it has that effect.
>
> "...Like a tax sale, the forfeiture is directed strictly at property, apart from the content of any expression contained therein. And like imprisonment for criminal obscenity transgression, the forfeiture is intended to penalize past distributions of illegal and unprotected obscenity. The

> legislator could just as easily have imposed a fine or other property-related penalty. Instead, the legislator has chosen to punish the violator by temporarily depriving him of property which was used in committing the violation."

Judge Johnstone is concerned that by focusing on places of sale and exhibition, rather than merely upon material sold or exhibited, the ordinance intrudes upon protected speech. Specifically, it prevents an entire place from disseminating constituionally protected, non-obscene materials, simply because the place has sold or has exhibited obscene materials in the past. The Court went on to say that "Moreover, because the ordinance allows the entire business to be declared a publis nuisance, it encourages a business person to steer wide of the danger of avoiding questionable but nonetheless protected films and publications."

The decisions a businessman would make under this ordinance are considerably less than he is required to make under Kentucky's Penal Code. Under Kentucky's Penal Code a person can be imprisoned or fined if he has in his possession with the intent to distribute, exhibit or offer to distribute, one piece of obscene matter. For two pieces of obscene matter

it becomes a Class A Misdemeanor subject being jailed for a period of one year. (See KRS 531.020)

Whereas, the city oridinance requires public exhibition as a regular course of business or publicly and repeatedly exhibiting or possessing for the purpose of exhibition, obscene material, or where obscene publication contitutes all of the stock or trade or a principal part thereof. The requirements of the ordinance are much less restricting than the state statute, which the merchant must consider in making the decision on the "line between protected and unprotected speech (which) is dim and uncertain".

The businessman must avoid the protected but questionable matters in an effort to comply with the Kentucky Oscenity Statutes long before he has concern with the City of Paducah Ordinance. Further, innocent or negligent exhibitions do not establish a violation inasmuch as the continuing course of conduct must be presented before the ordinance comes into play. As the United States Supreme Court said in Kingsley Books, Inc. v. Brown, 354 U.S. 436 at 441:

> "We need not linger on the suggestion that something can be drawn out of the Due Process Clause of the Fourteenth Amendment that restricts New York to the criminal process in seeking to protect its people against dissmenation of pornography. It is not for this Court thus to limit the state in resorting to various weapons in the armory of the law. Whether prescribed conduct is to be visited by a criminal prosecution or by a qui tam action or by an injunction or by some or all of these remedies in combination, is a matter within the legislator's range of choice."

The District Judge relied heavily on a case of Universal Amusement Co. v. Vance, 587 F.2d 159, 165-166 (5th Cir. 1978), (en banc) Affirmed, Vance v. Universal Amusement Co., 445 U.S. 308, 100 S.Ct. 1156, 63 L.Ed.2d 413 (1980).

The Supreme Court said in Vance v. Universal Co., Inc.:

> "The Court of Appeals was quite correct in including both (a) that the regulation of community activities such as exhibition of motion pictures must adhere to more narrowly drawn procedures than is necessary for the abatement of an ordinary nuisance, and (b) that the burden of supporting an injunction against future exhibition is even heavier than the burden of justifying the imposition of criminal sanctions for past commissions."

The Court went on to say, "Contrary to appellant's second argument, the Court of Appeals did not

hold that there can never be a valid prior restraint on community activity. The Court of Appeals simply held that these Texas statutes were procedurally defective and that they authorized prior restraints that were more honorous than is permissable under Freedman v. Maryland Southeastern Promotions Ltd. v. Conrad, 420 U.S. 546, 95 S.Ct. 1239, 43 L.Ed.2d 448 (1975)".

In Southeastern Promotions Ltd. V. Conrad, 420 U.S. 546, 95 S.Ct. 1239, 43 L.Ed.2d 448 (1975), the Supreme Court said that "We held in Freedman" (Freedman v. Maryland, 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed. 2d 649 (1965)), "and we reaffirm here, that a system of prior restraint runs afoul of the First Amendment if it lacks certain safeguards: First, the burden of instigating judicial proceedings and proving that the material is unprotected must rest on the censor. Second, any restraint prior to judical review can be imposed only for a specified brief period and only for the purpose of reserving the status quo. Third, a prompt final judicial determination must be assured."

The ordinance of the City of Paducah meets all the tests set out in Southeastern Promotions; (1) the ordinance calls for the city to initiate the court

action against the alleged distributor of obscene material, (2) it has no restraint prior to judicial review, and (3) the ordinance calls for prompt filing of an action in the state court system.

In the case of Cahalan v. Diversified Theatrical Corp. , 59 Mich.App., 223, 229 N.W.2d 389 (1975) reversed on other grounds 396 Mich. 244, 240 N.W.2d 460, the Michigan Court upheld a statutory provision authorizing padlocking of premises, as a nuisance, used for the purpose of lewdness and rejected the defendant's contention that such provision was unconsitutional as imposing a prior restraint on materials presumatively protected by the First Amendment. The Michigan Court noted that a nuisance was found to exist in the showing of obscene films and that the statutory sanctions were imposed after a full judicial hearing because of past obscene exhibitions and not because of any possible future exhibitions, and the closure authorized by the statute did not restrict the right of the defendant to lawfully exhibit films not yet declared to be obscene, but simply prohibited defendants from doing so in particular buildings.

In the case of State ex. rel. Ewing v. "With-

out a Stitch", 37 Ohio St.2d 95, 66 Ohio Ops.2d 223, 307 N.E.2d 911 (1974) appeal dismissed 421 U.S. 923, 44 L.Ed.2d 82, 95 S.Ct. 1649, the Ohio Court held that the State's Nuisance Statutes prescribed a constitutionally permissible method of controlling the exhibition of obscene films, since the statutes included a definition of nuisance as a place where obscene films were shown, and the provisions mandating that an abatement order close the place in and on which a nuisance was maintained for one year.

California Courts also upheld a nuisance closure statute in the case of People ex rel. Sorenson v. Randolph, 99 Cal.App. 183, 160 Cal.Rpt. 69, holding that an order or abatement closing the theater did not infringe upon the owner's First Amendment rights as a prior restraint.

CONCLUSION

The City of Paducah, Joe Viterisi, as Mayor of the City of Paducah, P J Grumley, Robert Coleman, Harold (Shorty) Ford and Hal Cole as Commissioners of the City of Paducah, James W. Utter as Corporation Counsel, and Thurman Baker as Treasurer of the City of Paducah, respectfully submit to the Court that the

District Judge misinterpreted Ordinance No. 83-6-2388 in finding that the Ordinance impermissibly punishes non-obscene, protected speech. The appellants further respectfully submit to the Court that the Ordinance of the City of Paducah as adopted is constitutional and a valid weapon in fighting non-protected, illegal obscenity and does not infringe on the constituionally protected rights of the appellees. The closure provisions contained in the Ordinance are a valid exercise of legislative discretion in controlling non-protected obscenity, and the decisions a business person must make to avoid non-protected publications is less than he must make in interpreting the Kentucky Penal Statutes. The appellants further respectfully submit to the Court that they should accept the reasoning of the Idaho Court in Kidwell, 631 P.2d 622, vacate the Orders of the District Court and remand these cases to the District Court for a trial on the issue of whether or not the appellees come under tne sanctions of the City's ordinances.

Respectfully submitted,

/s/ James W. Utter
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Paducah, KY 42002-2267
ATTORNEY FOR APPELLANTS

NO. 86-307

Supreme Court, U.S.
FILED
OCT 8 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1986

CITY OF PADUCAH: JOHN K. PENROD, as Mayor, and JOE VITERISI, ROBERT A. COLEMAN, HAROLD (SHORTY) FORD and JAMES W. FLYNN, as Commissioners of said City: JAMES W. UTTER, as Corporation Counsel, and THURMAN BAKER, as Treasurer thereof,

Petitioners,

v.

INVESTMENT ENTERTAINMENT, INC.; BELTLINE NEWS AND ARCADE CLUB,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONERS REPLY MEMORANDUM

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IN THE

Supreme Court of the United States

October Term, 1986

CITY OF PADUCAH; JOHN K. PENROD, as Mayor, and JOE VITERISI, ROBERT A. COLEMAN, HAROLD (SHORTY) FORD and JAMES W. FLYNN, as Commissioners of said City; JAMES W. UTTER, as Corporation Counsel, and THURMAN BAKER, as Treasurer thereof,

Petitioners,

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Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONERS REPLY MEMORANDUM

Respondents' argument that the Petitioners have "waived" both the first defense (failure to state a claim upon which relief can be granted) and the

fourth defense (abstention) of their Answer[1] because they did not mention the same in their "Memorandum in Support of City of Paducah Motion for Summary Judgment" in the United States District Court[2] or in their "Brief for City of Paducah, et al."[3] in the Court of Appeals for the Ninth Circuit, is faulty in two regards.

First of all, Respondents' contentions are inconsistent with the plain language of the standard for adjudication summary judgment motions which has been established in Rule 56(c) of the Federal Rules of Civil Procedure, recently examined by this Court in Celotex Corp. v. Catrett, 477 U.S. ___, 91 L.Ed.2d 265 at 273, 106 S.Ct. ___.

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1 See Appendix "G" to the Petition for Writ of Certiorari at page G-1 and G-3.
2 See Appendix "I" to Respondents' Brief in Opposition.
3 See Appendix "J" to Respondents' Brief in Opposition.

(June 25, 1986). Further, Respondents' "waiver" argument ignores the Eleventh Amendment, jurisdictional aspect of Petitioners' "abstention" defense, and the import of this Court's recent ruling on Abstention in Ohio Civil Rights Commission, et al. v. Dayton Christian Schools, Inc., et al., 477 U.S. ___, 91 L.Ed.2d 512, 106 S.Ct. ___ (1986).

In the latter regard, Petitioners contend that the federal policy on comity does not permit an "implied" waiver because of the federal/state powers confrontation which is thereby invited. The requirement that the record must contain an "express" waiver avoids the inevitable Eleventh Amendment jurisdictional dispute which this Court created in the moral public nuisance abatement area, when it held in Mitchum, dba The Book Mark v. Foster, Prosecuting Attorney of Bay County,

Florida, 407 U.S. 225 (1972), that 42 U.S.C. section 1983 was an expressly authorized exception to the Anti-Injunction Statute, 28 U.S.C. section 2283.

I

IN ADJUDICATING PETITIONERS' MOTION FOR SUMMARY JUDGMENT, THE UNITED STATES DISTRICT COURT WAS REQUIRED, UNDER THE "PLAIN LANGUAGE" OF F.R.C.P. RULE 56(c), TO CONSIDER ALL OF PETITIONERS' PLEADINGS, INCLUDING THE FIRST AND FOURTH DEFENSES OF THE ANSWER.

The plain language of Rule 56(c) precludes the implication of waiver.

The test for adjudicating summary judgment motions is set forth in Rule 56(c) of the Federal Rules of Civil Procedure. That section provides:

> "(c) MOTION AND PROCEEDINGS THEREON. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories,

> and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment, as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages."

In Celotex Corp. v. Catrett, 477 U.S. ___, 91 L.Ed.2d 265, 106 S.Ct. ___ (June 25, 1986), this Court had occasion to consider the "mandate" of the plain language of that standard at page 273:

> "We think that the position taken by the majority of the Court of Appeals is inconsistent with the standard for summary judgment set forth in Rule 56(c) of the Federal Rules of Civil Procedure. Under Rule 56(c), summary judgment is proper 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' In our view, the plain language of Rule 56(c) mandates. . . ." (our emphasis).

Petitioners contend that the "plain

language" of Federal Rules of Civil Procedure 56(c), noted above, requires that the first and fourth defenses of the Answer, as pleadings, must be considered. Rule 56(c) precludes an application of the appellate "waiver" rule discussed by this Court in United States v. Estate of Donnelly, 397 U.S. 286 at 319, fn. 5 (1970) and relied upon by the Respondents herein.

In this special circumstance involving an adjudication of a summary judgment motion, comity does not permit the U.S. District Court below, in the face of the plain language of the federal statute and a record which documents a reliance upon the two special defenses of "abstention" and "failure to state a claim upon which relief can be based," to "presume" that the City of Paducah has waived state sovereignty which is the very foundation of its entire summary judgment motion.

II

RESPONDENTS' BRIEF IN OPPOSITION HAS IGNORED THIS COURT'S RULING IN OHIO CIVIL RIGHTS COMMISSION, ET AL. v. DAYTON CHRISTIAN SCHOOLS, INC. THAT DECISION HOLDS, IN EFFECT, THAT A WAIVER OF THE "STATE SOVEREIGNTY" CLAIM WHICH LURKS IN THE BACKGROUND OF ALL YOUNGER-HUFFMAN LITIGATION MUST BE EXPRESS AND MAY NOT BE PRESUMED.

Respondents' Brief in Opposition has ignored the Eleventh Amendment, jurisdictional aspect of Petitioners' abstention defense and this Court's recent decision in Ohio Civil Rights Commission, et al. v. Dayton Christian Schools, Inc., supra. The "appellate" waiver rule discussed at footnote 5 of United States v. Estate of Donnelly, 397 U.S. 286 at 319, which is cited by Respondents, can have no application where the merits of the underlying state claim are predicated upon a claim of "lack of jurisdiction" based upon "state sovereignty" and the Eleventh Amendment.

Where, as here, Respondents attempt to invoke the equity jurisdiction of the federal courts against a State government and the State government does not waive its attribute of state sovereignity, and does not expressly consent to have the challenge to the "important state interest" tried in the federal courts, the Tenth Amendment principles expressed in Fry v. United States, 421 U.S. 542 at 547, fn. 7 (1975), and the Eleventh Amendment principles expressed in Hans v. Louisiana, 134 U.S. 1 (1890) and Ex Parte Young, 209 U.S. 123 unite to present a potential jurisdictional conflict of state and federal powers. That conflict raises a question as to whether the federal court has jurisdiction to act on the matter under the fiction engaged in by this Court in Ex Parte Young, supra, and the resulting "interplay" of

that fiction and the policy limitations expressed by this Court in Watson v. Buck, 313 U.S. 387 at 401-402 (1941) which holds that a state statute, which contains a severability clause, must be "flagrantly and patently violative of express constitutional prohibitions in every clause, sentence, and paragraph, and in whatever manner and against whomever an effort might be made to apply it. . . ."before a federal court can interfere with the right of a state court to interpret such legislation.

The origin of this "jurisdictional" confrontation between state and federal power in the civil moral public nuisances abatement area can be traced to this Court's landmark decision in Mitchum, dba The Book Mark v. Foster, Prosecuting Attorney of Bay County, Florida, 407 U.S. 225 (1972). In Mitchum, a Florida County Prosecutor sought

to close a bookstore as a public nuisance. The state court entered a preliminary order prohibiting the store's continued operation and, after further proceedings in the state court, the store owner sought injunctive relief against the state action, arguing that his civil rights of free expression, under 42 U.S.C. section 1983 (protected by the First and Fourteenth Amendments) were violated by the state procedures. A three-judge District Court held that the injunction was prohibited by 28 U.S.C. section 2283. After this court noted jurisdiction in Mitchum on May 3, 1971, Associate Justices Black and Harlan departed from the bench, and the case was thereafter decided by a seven-member court which held abstractly, and without relation to the merits, that the Civil Rights Act of 1871, commonly referred to as 42 U.S.C. section 1983,

is an "expressly authorized" exception to the Anti-Injunction Statute.

In a concurring opinion, three of the seven justices participating in the decision (Chief Justice Burger and Associate Justices White and Blackmun) stated their concern over the potential conflict between state and federal powers such federal interference would spawn,and voiced the following caveat:

> "I concur in the opinion of the Court and add a few words to emphasize what the Court is and is not deciding today as I read the opinion. The Court holds only that 28 U.S.C. section 2283, which is an absolute bar to injunctions against state court proceedings in most suits, does not apply to a suit brought under 42 U.S.C. section 1983 seeking an injunction of state proceedings. But, as the Court's opinion has noted, it does nothing to 'question or qualify in any way the principles of equity, comity, and federalism that must restrain a federal court when asked to enjoin a state court proceeding.' Ante, at 243, 32 L.Ed.2d at 718. In the context of pending state criminal proceedings, we held in Younger v. Harris, 401 U.S. 37, 27

L.Ed.2d 669, 91 S.Ct. 746 (1971), that these principles allow a federal court properly to issue an injunction in only a narrow class of circumstances. We have not yet reached or decided exactly how great a restraint is imposed by these principles on a federal court asked to enjoin state civil proceedings. Therefore, on remand in this case, it seems to me the District Court, before reaching a decision on the merits of appellant's claim, should properly consider whether general notions of equity or principles of federalism, similar to those invoked in Younger, prevent the issuance of an injunction against the state 'nuisance abatement' proceedings in the circumstances of this case." (our emphasis).

II(A) The Historical Background of The "State Sovereignty" Issue Which Lurks In The Background of The Younger-Huffman Abstention Objection to Federal Jurisdiction

In 1908, this Court, in its landmark decision in Ex Parte Young, 209 U.S. 123 (1908) had held that State officials could be enjoined by Federal Courts from enforcing unconstitutional state

statutes, notwithstanding the Eleventh Amendment objection, through this Court's creation of a "fiction" in that case.[4/] Parenthetically, it must also be observed that the Ex Parte Young fiction does not authorize a federal court to enjoin state officials from enforcing constitutional state statutes, nor does its rationale and the evolution of that rationale permit that result. To the extent that such does occur as the result of the Ex Parte Young fiction and an erroneous federal court ruling, an infringement upon state sovereignty results, in much the same manner as an infringement upon civil rights in the application of unconstitutional state legislation, as Respondents have claimed in their federal cause of action in the U.S. District Court below.

4/ See Redish, Federal Jurisdiction: Tensions in the Allocation of Judicial Power (1980) at 154-159.

In 1910, as a response to the intrusion of Ex Parte Young on legitimate state powers, Congress enacted the Three-Judge Court Act (Act of June 18, 1910, Ch. 309, Section 17, 36 Stat. 577) which prohibited a single Federal district judge (as in this case) from issuing interlocutory injunctions against allegedly unconstitutional State statutes, and required that cases seeking such injunctive relief be heard by a district court made up of three judges. The Act also contained a provision for direct appeal to the Supreme Court in the belief that the provision for speedy review would minimize the impairment of the sovereign rights of state governments.

In 1976, as the number of the three-judge court cases and direct appeals, which resulted from this Court's decision in 1971 in Mitchum v. Foster,

supra, dramatically increased and clogged this Court's docket, Congress responded to this Court's supplications for relief from the workload by repealing the three-judge requirement - but only after the fears of Congress were dissipated by an assurance that the effect of the abstention doctrines established in Younger v. Harris, 401 U.S. 37 (1971) and Huffman v. Pursue Ltd., 420 U.S. 592 (1975) were such that "the rationale that gave life to the three-judge court in 1910 has all but disappeared." Report of the Senate Committee on the Judiciary (S.Rep. No. 94-204, 94th Cong., 1st Sess., 1975, p. 2).

II(B) Under This Court's Ruling on the Younger-Huffman Objection To Federal Interference in Ohio Civil Rights Commission et al v Dayton Christian Schools Inc., Waiver of State Sovereignty Must Be Express And May Not Be Presumed.

Petitioners submit that the Tenth and Eleventh Amendment problems dealing with the important state interests and state sovereignty that gave life to the Ex Parte Young "fiction", the three-judge court creation in 1910, and its repeal by Congress in 1976 under the assurance that the Younger-Huffman abstention doctrine would alleviate the state-federal conflict provided the historical precedent which caused this Court to rule as it did in Ohio Civil Rights Commission et al v. Dayton Christian Schools Inc., supra, that a waiver of state sovereignty must be express and may not be presumed, at page 521

> "The Commission urged such abstentation in the District Court, and on oral argument here. Dayton has filed a post argument brief urging that the Commission has waived any claim to abstention because it had stipulated in the District Court that that court had jurisdiction of the action. We think, however, that this argument misconceives the nature of Younger abstention. It does not

> arise from lack of jurisdiction in the District Court, but from strong policies counseling against the exercise of such jurisdiction where particular kinds of state proceedings have already been commenced. A State may of course voluntarily submit to federal jurisdiction even though it might have had a tenable claim for abstention. See Brown v Hotel Employees, 468 US 491, 500, n 9, 82 L.Ed.2d 373, 104 S Ct 3179 (1984); Ohio Bureau of Employment Services v Hodory, 431 US 471, 479-480, 52 L Ed 2d 513, 97 S.Ct.1898 (1977); Sosna v Iowa, 419 US 393, 396-397, n.3, 42 L.Ed.2d 532, 95 S.Ct.553 (1975). But in each of these cases the State expressly urged this Court or the District Court to proceed to an adjudication of the constitutional merits. We think there was no similar consent or waiver here, and we therefore address the issue of whether the District Court should have abstained from deciding the case.

The error of the Federal Court below was that it did not consider Ex Parte Young and the evolution of that doctrine.[5/]

5/ See, generally, Redish, Federal Jurisdiction: Tensions in the Allocation of Judicial Power (1980) at pages 154-159 and Section V "Decyphering Congressional Intent" at page 163 et seq.. At page 157, the author notes:

> "The danger of any legal fiction is that those applying it will forget the purpose it was designed to serve. This has proven true in the application of the doctrine of Ex Parte Young."

III

THE ALLOCATION OF STATE AND FEDERAL POWER IN THE AREA OF CIVIL ABATEMENT OF MORAL PUBLIC NUISANCES, WHICH WAS DRAWN IN QUESTION BUT LEFT UNDECIDED BY THIS COURT'S NOTE OF JURISDICTION IN MITCHUM V. FOSTER IN 1971, IS RIPE FOR REVIEW AT THIS TIME.

The three questions which are presented in the Paducah petition are: (1) Whether a state has the power to declare a place which is a manufactory of obscenity to be a per se public nuisance; (2) Whether a state has the power to revoke the business license of that activity as an unlawful trade practice under state law, and (3) Whether state sovereignty and the Tenth and Eleventh Amendments preclude a federal court from interfering with such governmental interest.

Although the seven-member Court in Mitchum v. Foster decided against the state's interest in relation to the last question, insofar as the

jurisdictional question presented by 28 USC Section 2283 was concerned, the Mitchum Court did not address the first two questions (which were inherent in the law enforcement effort in Mitchum). There, those questions went unanswered. See Chief Justice Burger's concurring opinion in Mitchum, supra, appearing at page 11 supra.

That the above questions are ripe for reexamination, see generally, the Attorney General's Commission on Pornography, Final Report, July 1986, and the brief reference at page 757-758 to "nuisance laws". More particularly, note this Court's recent decision in Arcara District Attorney of Erie County v. Cloud Books Inc., et al 478 U.S.____, 92 LEd 2d 568, 106 SCT ___(July 7, 1986); the Amicus Curiae Brief of the City of Santa Ana, California in the Arcara case; and the Amicus Curiae Brief of the City of Santa

Ana, California in the City of Paducah Petition for Writ of Certiorari herein.

On the question of ripeness, this Court is asked to take Judicial Notice of the news report appearing this past week in the Orange County Edition of the Los Angeles Times, attached hereto as Exhibit I. The final result in that 10 year civil abatement proceedings is dependent upon this Court's resolution of the same two legal questions which are before this Court in the Paducah Petition.[6/]

Dated:
Oct. 6, 1986

Respectfully Submitted,

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6/ The Theatre has moved for summary adjudication on the issues of "closure" and "license revocation." On a cross motion, Santa Ana has asked for summary adjudication on the identical issues which are framed as Questions II(a) and II(b) in the Paducah Petition, citing the Santa Ana Ordinance to distinguish People ex rel Busch v. Projection Room Theater, 17 Cal. 3d 42.

CERTIFICATE OF SERVICE

I, hereby certify that on this ~~6th~~ 7th day of October , 1986, the original and 40 copies of the within Petitioners Reply Brief were deposited in the United States Post Office in ~~Van Nuys~~ Sun Valley, California with first-class postage prepaid, and properly addressed to the Clerk of the United States Supreme Court.

I further certify that three (3) copies were also mailed, postage prepaid, to the below listed parties to the proceedings and that all parties required to be served have been served.

Mr. Joseph S. Freeland
Freeland, Glanville and Megibow
910 Citizens Bank Building
Paducah, Kentucky 42001
(Attorney for Respondents)

Attorney for
Petitioners.

EXHIBIT 1

Copy of News Article in the Orange County Edition of the Los Angeles Times Reporting on the City of Santa Ana's Ten Year Public Nuisance Abatement Lawsuit With the Mitchell Brothers Santa Ana Theatre.

(Reference: Petitioners' Reply Brief at page 20.)

BEST AVAILABLE C

Los Angeles Times
Sunday, September 28, 1986

Council Fears Image Damage

A Long, Costly 'Porn War': Why Santa Ana Fights On

By STEVE EMMONS, *Times Staff Writer*

There was no warning. One day the theater marquee read "The Apple Dumpling Gang" and "Swiss Family Robinson," the next day, "Sodom and Gomorrah."

The nice, new United Artists theater at Honer Plaza in north Santa Ana—the part of town containing the city's well-to-do and middle-class neighborhoods—overnight became the Mitchell Brothers Theatre, specializing in hard-core erotic films.

The neighbors reacted just as suddenly. They stormed the City Council chambers and demanded immediate action from surprised council members. Their appearance in 1975 set off what former Santa Ana Councilman Gordon Bricken has called "a chain of inevitable events." Responding to the wrath of the neighbors, the council launched a legal attack to close down the theater.

'The Mitchell brothers are a savvy group of guys.'

—Gordon Bricken,
former Santa Ana councilman

And now, Bricken said, the council can never retreat without being accused of standing "for" pornography.

The result: 11 years of costly litigation that continues with no indication of when it will end. Virtually every week the city files a new lawsuit against the theater—filings that have become so routine that the theater's lawyer does not appear in court to oppose them. He lodges his objections by telephone.

The city, which has filed close to 40 lawsuits against the theater, has paid more than $300,000 in legal costs and is piling up additional legal expenses at an estimated rate of at least $100,000 a year. To add to the city's potential costs, two Superior Court judges have ordered the city to pay some of the theater's legal expenses, estimated by theater attorneys to be more than $1 million in one suit alone.

During the 11 years, some of the movies have been banned from the theater as obscene, but no court—from the Superior Court in Santa Ana to the Supreme Court in Washington—has been willing to order the theater closed. The city attorney has advised that the case cannot be won under present case law.

And the theater remains open, still is showing

THEATER: Political 'Predicament' Cited in Long, Costly Legal Battle

X-rated films and, according to both city and theater sources, is grossing a little under $1 million a year.

Yet there are compelling political reasons for the City Council to keep up the attack on the theater, regardless of cost. They were demonstrated last February when, in closed session, all but one council member expressed willingness to end the litigation with an out-of-court settlement. That same night in public session, however, the council unanimously voted $200,000 to intensify the attack.

How could this happen?

"It's just a predicament for us, and the less said, the better," said Councilman Wilson B. Hart during an interview.

As brief as he was, Hart said more than most other council members would. Mayor Dan Griset, a candidate for state Assembly, sent word through an aide that he wouldn't be commenting at all. Councilwoman Patricia A. McGuigan said she doesn't even discuss it with her husband. Other council members simply didn't return calls.

The city's dilemma was politically unavoidable, said Bricken, a City Council member from 1974 to 1984 who did, and still does, favor the litigation. The die was cast the moment the outraged neighbors first appeared before the council, he said.

"In my view—and I've felt this from the outset—it was a chain of inevitable events: That as long as the public appears at all, at *any* time, to express public outrage on this subject, it will go on and on, like a perpetual motion machine. And that's in fact what's happened. . . . Because regardless of what the court might be doing or what anybody else's view is on the subject, it is simply unpopular to be on the side of pornography."

But the City Council contributed its share to the predicament, Bricken said, by making a naive, fundamental miscalculation.

"Not in the wildest scenario did anyone ever imagine a group of porno movie makers would have the ability to stay in this 10 years. Not *two* years. . . . We [council members] had this discussion. The idea of getting into it was the theory that the big guy on the block could just knock 'em out, Bricken said.

"The perception was that these movies are made by two guys who are milkmen in their regular life, and they do this to make a few bucks," Bricken said. In reality, the council discovered, "the Mitchell brothers are a savvy group of guys," Bricken said.

The Mitchell brothers, Jim and Artie, are headquartered in San Francisco. They not only operate theaters but produce many of the

AVAILABLE COPY

films shown in them. Many of the X-rated videotapes available today are Mitchell Brothers productions. In Santa Ana, their theater manager said, 150,000 customers buy tickets each year.

"We've been in this business 18 years, and we've had over 500 [court] cases—copyright, obscenity, pornography. It's a cost of business," Jim Mitchell said.

"This is a hell of a big case. We're going to go all the way with them," he added. "We expect to win. We will do whatever it takes."

Same Position

The Santa Ana City Council, faced with a difficult but not unusual political situation, took much the same public position in 1975, Bricken recalled.

United Artists had built a large, single-screen theater at the outskirts of Honer Plaza just as the industry was changing to small, multiscreen theaters in the heart of shopping centers.

Faced with a long-term lease and low revenues, United Artists sublet the theater to Mitchell Brothers. Under the terms of United Artists' master lease, zoning and use permits, it needed permission from no one to lease the theater to Mitchell Brothers.

The brothers were trying to upgrade the image—and therefore broaden the audience—of X-rated films by using more polished movie production techniques and exhibiting the films in large, well-kept theaters. They were rapidly expanding their small string of theaters for the opening of their $500,000 production, "Sodom and Gommorah," an epic by X-rated movie standards.

'Sleazy Little Theaters'

"So one day someone drives to the Ralphs grocery store or the Montgomery Ward's," Bricken said. "All of a sudden here's this marquee, you know, giving you these titles—'Mary Lou Has a Good Time.' And some of the housewives had never even imagined that such things even were on film, much less on a marquee."

They were outraged, Bricken said, but there was more:

"The vision of these films was [that] they appeared in sleazy little theaters or in artsy-craftsy places in Hollywood, generally in neighborhoods that were rundown. . . . And so when they saw the theater, the reaction was: 'Oh, my God, it's coming to *our* neighborhood! Not only the theater, but *they* are coming to our neighborhood. And our whole way of life is threatened by this theater.' "

Bricken's appraisal was echoed somewhat by the pastor of First Christian Church, across the street from the theater. The Rev. Norman Conner, credited by many as the original organizer of the protest, said years later that it had been a matter of location. The city already had an X-rated theater, The Guild, but it was in a run-down downtown area, viewed as the proper environment for such a theater.

"My position is that if someone wants to spend their money to see this trash, that's their right and privilege . . .," Conner said. "If it was down on Harbor Boulevard, I probably would never have gotten involved."

But it wasn't, so he did, and a group of angry parishioners and neighbors appeared without warning before the City Council late in 1975.

Moral Issues

For years, then-Mayor Lorin Griset, father of the present mayor, had been successfully urging his fellow council members to become more indignant about moral issues in the city, particularly the adult bookstores and topless bars along Harbor Boulevard. "It had a lot to do with sensitizing us" to such issues, Bricken said.

So, he said, when presented with angry citizens protesting an X-rated theater, the council did what it

BEST

usually does under such circumstances, Bricken said. "You send off your troops to see if you can run [the theater] out of town. And that was the beginning of it."

The city attorney, Keith Gow, was sent off to investigate, and he returned, Bricken said, to say that instead of a gold mine, "it's a mine field, that the city really has no authority through its own police powers to do anything about it. The only way that it can attack the situation is through the question of obscenity."

At the council's request, Gow pursued the obscenity question and returned to the council with James J. Clancy.

■

As a political activist, Clancy had helped form national anti-pornography groups campaigning for stronger laws and enforcement. As an attorney subsidized by Citizens for Decency Through Law (now headquartered in Scottsdale, Ariz.), Clancy had been offering legal advice and representation to cities wanting to close down or zone away adult bookstores and theaters.

He had the reputation of a relentless, no-compromise trial attorney fueled by a religious certainty of his cause. He had no other practice.

His supporters in Santa Ana have called him "very committed." His detractors describe him as "obsessed."

Areas Not Explored

"He gave us a presentation in executive session," Bricken said. "He laid it out, I thought, fairly candidly. He felt there were areas of the law that had not been explored. He felt it would be possible to form the law to favor the kind of things we wanted to do.

"He's always conveyed a very firm position that we will win in the long run and that the whole question here is how long it's going to take us to do it."

Clancy said it would require five years to take the issue to the U.S. Supreme Court and it might take several trips there to get the job done, Bricken recalled. "And the council basically said, 'Go get 'em.'

"Frankly, some people expected that we'd go out there, slap the thing on the door and they're gone. Scare them away. And some people felt that the staying power of the city would drive these guys out of business. Some people didn't expect it to last five years, even though Clancy may have told them that."

In October, 1976, the City Council adopted an ordinance drafted by Clancy that declared a theater specializing in "lewd" films to be a "public nuisance."

City councils traditionally have had the power to order removal of dangerous nuisances, such as dilapidated buildings, unfenced pits and noxious dumps. In effect, the new ordinance declared lewd movie theaters to be morally dangerous and therefore also a public nuisance.

Review the Films

Under its provisions, the City Council would review the films, declare them to be lewd, declare that the theater, therefore, is a public nuisance and vote to revoke the theater's business license.

The ordinance required, however, that the council's declarations be confirmed in court. If the judge agreed the films were obscene—and agreed that the ordinance was constitutional—he or she would ban the movies, confirm the license revocation and order the theater to pay damages to the city. Money won this way would permit the city to continue the fight virtually cost-free and indefinitely, according to Clancy's strategy.

Almost immediately, Clancy filed the first of the "public nuisance" lawsuits, and what followed has been described by both sides as legal guerrilla warfare. At times, the maneuvering took weird turns.

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The Mitchell brothers at first voluntarily provided the disputed films and showed them to the court inside their theater. On two occasions, Clancy rented space in the Independence Hall replica at Knott's Berry Farm in Buena Park to screen the films for judges.

But fearing that Mitchell Brothers would resist providing films—a fear that came true—Clancy hired a longtime colleague, former Los Angeles Police Department vice officer Robert McGuire, to attend every movie shown at the theater and record it for evidence. Typically, the theater was showing a different, three-movie bill each week.

$30-an-Hour Assignment

McGuire performed his $30-an-hour assignment for 11 years before being unmasked by theater employees.

He bought a ticket and sat directly in front of the screen. He wrapped an 8-millimeter movie camera in a brown towel and aimed it at the screen, taking one frame each three seconds. He also used a small audio tape recorder and took notes as well.

The result of each week's work was a large artist's portfolio filled with what Clancy termed "time-motion studies": page after page containing strips of small photographs, a depiction of what was showing on the screen at three-second intervals. Also included in some portfolios are commercial videotape versions of the movies in question.

These portfolios have stacked up in two courtrooms and in storage rooms at City Hall. Clancy still brings one each week to court, where he files another lawsuit asking that the court temporarily enjoin that week's bill of movies and set the matter for trial.

The weekly suits became such a ritual that Superior Court Commissioner Jane D. Myers set up ground rules to expedite them.

Routine Hearings

The hearing held Sept. 15 was typical. Only Myers and Clancy were before the bar in Department 22 of Superior Court. Attorney Stuart Buckley, representing the theater, was in his San Francisco office, waiting beside his telephone.

Myers: "Mr. Clancy?"

Clancy: "Good afternoon."

Myers: "You have anything new for me today?"

Clancy: "No, it's the same thing."

He briefly summarized. She asked whether all was exactly as in previous suits. "Yes," Clancy said, "except for the films."

The weekly call was placed to Buckley, who telephonically opposed Clancy's petition.

"Very well," Myers said, "then the request will be denied."

The entire hearing took 4 minutes and 33 seconds—about average, Myers said later.

A few of the close to 40 lawsuits Clancy has filed have resulted in judges and juries declaring specific films to be obscene. Appellate justices have upheld one of those decisions.

But no trial judge has upheld the city's "public nuisance" ordinance. One said it appears to violate the U.S. Supreme Court's doctrine of "prior restraint"—that is, it attempts to stifle future expression on the suspicion that it will be obscene.

"I have a disagreement with CDL (Citizens for Decency Through Law), because I'm the only one who really believes in the 'public nuisance' concept . . .," Clancy said. "I'm saying that the question has not been answered yet [by the U.S. Supreme Court], but it's *about* to be.

"I'm talking about a case where you're laying the foundation for a result that has got to come about. You go up there and take a look. There's 96 films, and every one of them is clear, unadulterated hard-core pornography."

Private Debates

City sources say Clancy has on several occasions stated his strategy: to continue the pressure on the theater, continue to appeal and wait for the U.S. Supreme Court to become more conservative and therefore sympathetic.

During the history of the litigation, council members have come and gone, but they all have debated privately whether to throw in the towel, Bricken said.

"There would always be these milestones when you had to fund it again, and you would have the same discussion: Do we quit? Do we go ahead?

"The secret pact behind the scenes is, we all got to stand one way or another, because nobody can afford to stand [on] either side by themselves. So if one guy on this deal says, 'I don't care what those guys are doing. I'm fighting for God and country and motherhood and all the things that are right in our country,' do you believe any of the rest of them are going to say they're for pornography?"

That is what happened during a closed council session on the proposed settlement negotiated by the city attorney last February, according to former Santa Ana City Manager Robert C. Bobb. Bobb, now city manager of Richmond, Va., in essence, corroborated the account given by Councilman John Acosta, the lone holdout.

"I had no idea it was going to be so easy at the time," Acosta recently recalled.

"I sat there and listened to the whole spiel. They *crucified* Clancy: 'He's no good, he's worthless,' blah, blah, blah.

"There was no official vote taken. It was assumed: We were going out there and accept the settlement offer, dump Clancy and dump the case.

"So we all stand up from the table to walk out, and I said, 'Well, I'm glad the majority of you guys feel that way. I, for one, *don't* feel that way. I'm not going to support the issue. I'm going to oppose it [the settlement].'

"And boy, you could smell rubber burning when I said that. They all skidded to a stop five feet short of the door. They said, 'We're not going to go out there and have you paint us as supporters of pornography.' "

Supporters of Pornography

Acosta said he would have done so, too.

" . . . I'd have said, 'We just happen to have a majority of the council that favors pornography in this community. Now, I don't know how the people of the community feel about pornography, but *I* have a feeling that they don't like it.' "

Acosta likes to judge beauty contests and as part of one was pictured off to the side in a Oui magazine article titled "Oui's Orange County Girlie Search . . . the biggest flesh hunt in Southern California history." The presence of an X-rated theater in north Santa Ana "doesn't really matter to me personally," Acosta said.

But, he added, north Santa Ana is where he lives, and 40% of Santa Ana votes during the June primary election came from that area.

"Now when you say 40%, do you see why John Acosta is where he's at?" Acosta said. "I evaluate the vote results carefully." He has his eye on Roger Stanton's seat on the county Board of Supervisors, Acosta said.

Three council incumbents—P. Lee Johnson, Robert W. Luxembourger and Dan Young—are seeking reelection in November, and even though each comes from one of seven City Council wards, voters citywide cast votes for all council seats.

That could change. An initiative on the same ballot would provide election of council members strictly by ward. Acosta says he thinks it will pass, making his reelection a matter strictly for north Santa Ana voters—the ones who seem to hate the Mitchell Brothers Theatre.

Los Angeles Times
Sunday, September 28 198

"I will be sticking by my guns. If the election-by-ward plan gets voted in, I'm going to be very happy. I'm going to be happy either way. I'm happy because I've done a good job of representing Ward 3," Acosta said.

■

In the end, the issue may be settled without a court.

The United Artists' lease on the theater property extends 15 or 20 years, the shopping center owner says, but Mitchell Brothers' sublease expires in June, 1990.

The city in the past considered including Honer Plaza and its theater within the city's redevelopment project boundaries, but the former owner of the center was categorically opposed, Bricken said.

For the past two years, however, the center has been under new ownership—Interstate Consolidated Industries of Carson—and a spokesman for that firm said it is amendable to redevelopment. "It needs to be remodeled anyway," the spokesman said.

Patti Nunn of the city's redevelopment agency said the possibility is being explored. (The only other X-rated theater in the city, The Guild, was moved out by redevelopment.)

Once dislodged from its present theater building, Mitchell Brothers would be subject to the city's zoning ordinances if it wanted to relocate in Santa Ana. The U.S. Supreme Court has ruled that cities legitimately may control where such theaters are located within their boundaries.

But if the issue must be settled in court, there may be no end in sight, Bricken said.

For one thing, even futile litigation can be justified as preventing proliferation of X-rated theaters in the city. "You can say there was only one in 1975 and there's *still* only one in Santa Ana. It's kind of a holding action."

And you can justify it as "a statement of public principle, of what you think is right for the community. And you don't get many opportunities in this arena of public morality to fight the good battle, the good cause."

But most of all, Bricken said, you stay on the righteous side of the issue, regardless of the cost. "Nobody is going to give up this issue until they're *forced* to give up this issue, no matter what they say. . . .

"I would hope that certain council members take the position that we should abandon this lawsuit, because we're going to beat them over the head two years from now," Bricken said.

Los Angeles Times
A-8 Sunday, September 28, 198

Lurid Marquees Catch the Eye and a Little Hell, Too

By BILL BILLITER, *Times Staff Writer*

The Mitchell Brothers Theatre marquee Saturday advertised the showing of "Pretty Girls" and "Love of Silk."

The billing brought afternoon moviegoers, but it also irked some of those doing their Saturday errands at a shoe store, doughnut shop, grocery and drugstore that share Honer Plaza with the controversial movie house.

"I don't like it," Maria Alegria of Santa Ana, accompanied by her 10-year-old daughter, said of the theater's proximity. "I don't think it's appropriate for the kids, and I've seen some real nasty people around that theater."

But among other shoppers and workers Saturday, opinions were mixed about the presence of the Mitchell Brothers Theatre.

Paul Harris, 32, of Santa Ana, pausing to buy a newspaper, said: "It doesn't bother me in the least. Not at all. But I don't go there."

Melanie Bowman, 22, of Santa Ana, pushing one son in a stroller and holding another's hand, said the theater has a right to be there "as long as it doesn't infringe on other people." But Gertrude Eckart, 56, of Orange said the theater "bothers me. It'd be nice if it could be moved."

Roberto Barragan, 27, of Garden Grove agreed. "I've never been there," but, "I think it's bad for this area, and I know some churches and others that want to close it down," he said.

Dorothy Farmer, 69, of Santa Ana spoke critically: "I don't think it belongs. They ought to put it somewhere else if it's got to be here."

At the Ralphs supermarket, store manager Brent Blackhurst, 36, of Oceanside said, "Customers have once in a while said, 'Something ought to be done about that.' [But] it's strictly a constitutional and legal question. Ralphs Grocery Co. wants to be in a community that is family oriented, because the basis of our business is the family.

"I've received complaints from customers about Mitchell Brothers, and certainly Ralphs supports any effort which is done to return Honer Plaza to more of a community atmosphere. But we do support the Constitution."

However, Ramiro Torres, 23, the manager of a Thom McAn shoe store, said he hasn't heard much complaint. "It's not a big issue," he said.

SAM MIRCOVICH

Melanie Bowman, with Nicholas, 4, and Jonathan, says theater has right to be there.

GARY AMBROSE

Portfolios of evidence from Santa Ana's suits against the Mitchell Brothers line a courtroom wall.

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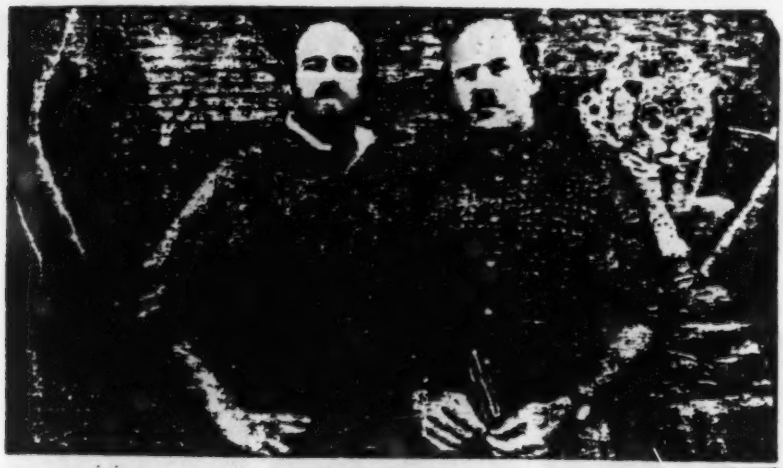
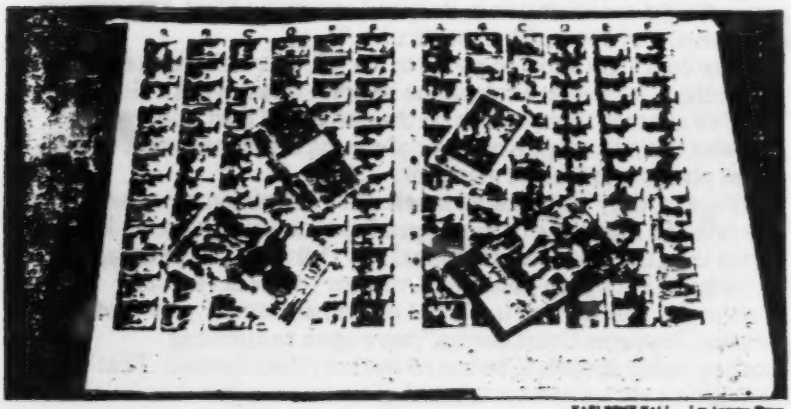
THEATER: No End in Sight to City's Legal Battle With Mitchell Brothers



The Mitchell brothers, Artie, left, and Jim, stand in front of their San Francisco adult theater

The Mitchell Brothers' lease on the United Artists theater at Honer Plaza runs out in June, 1990



KARI KEHR HALL Los Angeles Times

Photographs and videocassettes make up some of the evidence in lawsuits against the theater.

THEATER: Politics Cited in Refusal to Give Up Fight

JOHN ACOSTA
City councilman

GORDON BRICKER
Planning Commissioner

JAMES J. CLANCY
City attorney

Local Authorities Gaining Ground in Fight Against Adult Businesses

Local jurisdictions are being given a greater opportunity to decide how to handle films and other activities they consider obscene, two law professors say.

Although the U.S. Supreme Court has refused to authorize the closure of a theater for showing obscene films, it has acted "to loosen up the ease in which state and local communities can regulate this kind of material," William Van Alstyne of Duke University said.

Van Alstyne, who teaches constitutional law in regards to freedom of expression issues, said that the present court "has been exceedingly conservative in its trend under the First Amendment in general and obscenity in particular."

"The court has allowed states to use a looser definition of obscenity," he said in a telephone interview last week. "Second, they've allowed them to jack up the penalty. Third, they've allowed them to adopt a number of zoning ordinances that drive these places into limited locations.

"Fourth, they've invested much more discretion in juries, so that the fate of a magazine or movie producer depends more on local juries than the state constitutional law than it did 10 years ago."

Richard Fallon, an assistant professor of law at Harvard University specializing in First Amendment issues, said that the present Supreme Court seems "more open to allowing pornographic speech to be zoned [rather] than banned. That's a distinction with a certain amount of common-sense attraction. If the argument is that it offends some people, instead of banning it, why not move it out of the way?"

—STEVE EMMONS

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NO. 86-307

Supreme Court, U.S.
FILED
AUG 25 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
Supreme Court of the United States

October Term, 1986

CITY OF PADUCAH; JOHN K. PENROD, as Mayor, and JOE VITERISI, ROBERT A. COLEMAN, HAROLD (SHORTY) FORD and JAMES W. FLYNN, as Commissioners of said City; JAMES W. UTTER, as Corporation Counsel, and THURMAN BAKER, as Treasurer thereof,

Petitioners,

v.

INVESTMENT ENTERTAINMENT, INC.; BELTLINE NEWS AND ARCADE CLUB,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

AMICUS CURIAE BRIEF OF THE CITY OF SANTA ANA, CALIFORNIA, IN SUPPORT OF PETITIONER

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EDITOR'S NOTE

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TABLE OF AUTHORITIES CITED

CASES

Arcara, District Attorney of Erie County, NY v. Cloud Book Inc., et al., ___ U.S. ___ (July 7, 1986). . 3,4,5,12, 19,25,26, 29

Art Theater Guild, Inc. v. Ohio ex rel. Ewing, 421 U.S. 923 (1975),. 42

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Commonwealth v. Sharpless, 2 S&R (Penn.) 91, 7 Am.Dec. 632. 34

General Corporation v. State of Alabama ex rel. Sweeton, 320 So.2d 668 (1975). 6

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Ohio ex rel. Ewing v. "Without A Stitch", 307 N.E.2d 911. 42,43

People v. Lim, 18 Cal.2d 872, 879 (1941). 27

People ex rel. Busch, et al. v. Projection Room Theater, 17 Cal.3d 42 (1976). 16,27,28,29

People ex rel. Cooper v. Mitchell Brothers Case No. 45-80-37. 23

People ex rel. Hicks v. "Sarong Gals" 42 Cal.App.3d 556 (10/18/74), Hrg. Den. Cal.S.Ct. 12/11/74 . . . . 6, 7

People ex rel. Sorenson v. Randolph, 99 Cal.App.3d 183 (C.A. 1st, Div. 1, 11/30/79). 7,8

People ex rel. Gow v. Mitchell Brothers Case No. 29-91-83 20,22,24

People ex rel. Gow v. Mitchell Brothers Case No. 35-55-93. 20,22,24

James Phalen v. Commonwealth of Virginia, 12 L.Ed. 1030 (1850). . . 32,39

Rex v. Curl, 2 Strange 789 (1727). . . 32

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State ex rel. Kidwell v. U.S. Marketing, Inc., 454U.S. 1140 (Probable Jurisdiction Noted). . . . 7,20

State ex rel. Kidwell v. U.S. Marketing, Inc., 455 U.S. 1009 (Appeal Dismissed on Motion of Appellant). 7,20

Trans-Lux Dist. Corp. v. Bd. of Regents, 248 N.Y.S.2d 857 (3/26/64). 45

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AMICUS CURIAE BRIEF OF THE CITY OF SANTA ANA, CALIFORNIA, IN SUPPORT OF PETITIONER

INTEREST OF AMICUS CURIAE CITY OF SANTA ANA

City of Paducah Public Nuisance Abatement Ordinance 83-6-2388, as to which the City of Paducah is seeking review in

its petition for writ of certiorari herein, is essentially the same ordinance as Santa Ana Public Nuisance Ordinance NS1325 which was adopted by the City of Santa ten years ago to control the obscene films being exhibited at the Mitchell Brothers' Theater in Santa Ana. Santa Ana Ordinance NS1325 enacted in 1976, has governed the actions of the Santa Ana City Council in the ten years of the City's litigation with the Mitchell Brothers' Santa Ana Theatre.

A. SANTA ANA PUBLIC NUISANCE ORDINANCE NS1325 AND PADUCAH PUBLIC NUISANCE ORDINANCE 83-6-2388 ARE IDENTICAL ORDINANCES.

Santa Ana Public Nuisance Ordinance NS1325 was drafted to control a pornographic motion picture theater business (Mitchell Brothers' Santa Ana Theater) which exhibited obscene films as its regular and only course of business, and was so limited. Paducah Public Nuisance

Ordinance 83-6-2388 contains the identical provisions on pornographic motion picture theater businesses (section 19-152) and includes an additional section (section 19-153) to control pornographic bookstore businesses which deal with the sale of "publications" and the sale and exhibition of "arcade-type films" which are defined as "publications". Santa Ana Ordinance NS1325, in its entirety, appears at Exhibit 2 to the "Motion to Allow Amicus Curiae City of Santa Ana To Argue", in Richard Arcara, District Attorney of Erie County, Petitioner v. Cloud Book Inc., etc., et al.. See motion denied in ____ U.S. ____, 89 L.Ed.2d 911, (July 7, 1986). Compare, in this regard, hereafter at Appendix (A), Santa Ana Municipal Code Sections 12-102(A) and (B) and Paducah Ordinance 83-6-2388, Sections 19-152(A), (B) and (C); Santa Ana Municipal Code Section 12-104(A) through (D)

and Paducah Ordinance 83-6-2388, Sections 19-155(A) through (D); and Santa Ana Municipal Code Sections 12-105(A)(1)and (2) with Paducah Ordinance 83-6-2388, Sections 19-156(A)(1) and (2).

B. THE PADUCAH PETITION FOR WRIT OF CERTIORARI PRESENTS THE "CLOSURE" ISSUE WHICH WAS LEFT UNANSWERED BY THIS COURT'S DECISION DURING THE 1985 TERM IN ARCARA.

The Petition for Writ of Certiorari herein presents this Court with the "Closure" question which was left unanswered by this Court's recent decision on July 7, 1986 in Arcara, District Attorney of Erie County v. Cloud Books, Inc., etc., et al., ____ U.S. ____, 54 L.W. 5060 (July 7, 1986). Arcara involved a public nuisance in the form of lewd public conduct in three (3) dimensional form, which was occurring upon the place of business known as Cloud Books Inc., a bookstore. Here, the unlawful conduct

and activities giving rise to the public nuisance abatement action, which the City Attorney was prepared to prove in the State action below and which was removed to the federal court, is the maintenance of a public nuisance in the form of a place of business in which obscene publications constitute all of the stock in trade, or a principal part of the stock in trade. See Arcara, 54 L.W. at 5061.

C. THE "CLOSURE" OR PADLOCK" OR "LICENSE REVOCATION" OF A PLACE OF BUSINESS IS NOTHING MORE THAN AN "IN REM" REMEDY IN THE FORM OF REFORMATION OF REAL PROPERTY WHICH IS A HEALTH (MORAL) PUBLIC NUISANCE.

In Arcara, the City of Santa Ana submitted an Amicus Curiae Brief in Support of the Erie County, New York District Attorney, in which it argued that New York Public Health Law, Article 23, Title II, was simply a codification of the Common Law rule that a court may assume in rem jurisdiction over real estate (the res)

which is a health menace and "reform" the property so as to eradicate the health public nuisance. See General Corporation v. State of Alabama ex rel. Sweeton, 320 So.2d 668 at 674 (1975). Sections 2320 through 2332 of the New York Public Health Law (Red Light Abatement Statute) in Arcara simply provided a formula for carrying out the process of reformation.

Amicus Curiae City of Santa Ana submits that the proper construction of the so called "closure" or "padlock" or "license revocation" remedy---and one which avoids the "red herring" which is regularly employed by those dealing in hard-core materials, is the rationale expressed by the Court of Appeal, Fourth District, in People ex rel. Hicks v. "Sarong Gals", 42 Cal.App.3d 556, 117 Cal.Rptr. 24 (Oct. 18, 1974), hearing denied by the California Supreme Court on December 11, 1974, involving

"entertainment"; and by the Court of Appeal, First District, in People ex rel. Sorenson v. Randolph, 99 Cal.App.3d 183, 160 Cal.Rptr. 69 (Nov. 30, 1979). Those cases analyze the proceeding as an "in rem" action to reform the real property. For a "modern" adaptation of the same statute, see State ex rel. Kidwell v. U.S. Marketing, Inc., 102 Idaho 451, Probable Jurisdiction Noted, 454 U.S. 1140, Appeal Dismissed on Motion of Appellant, 455 U.S. 1009, in which the Idaho Supreme Court upheld the "closure", and "padlock", stating that it was not a "prior restraint" against the person, but was instead merely an in rem punishment imposed on the property, analogous to a civil forfeiture of property used in a crime.

In People of the State of California ex rel. Hicks v. "Sarong Gals," supra, the Court was construing an application of the California Red Light Abatement Statute.

There, the trial court permanently enjoined certain parties from maintaining, using or occupying the premises known as "Sarong Gals" for the purpose of "lewdness" and had closed the premises to all use for one year. In affirming the permanent injunction, the Court of Appeal, Fourth District analyzed the "padlock" provision as an "in rem" rather than an "in personam" remedy, and the principal objective as the reformation of the property itself.

In People of the State of California ex rel. Sorenson v. Randolph, supra, the Court of Appeal, First District, Division 1 also was construing an application of the California Red Light Abatement Statute. There, the district attorney's office had amassed considerable evidence that the premises were being used for allegedly immoral purposes; that, for example, cocktail waitresses regularly solicited acts of prostitution; that customers were

(illegally) "cadged" for drinks; that lewd acts such as masturbation were performed on customers, including police investigators; and, in general, that the ownership promoted a systematic course of illegal sexual acts such as to warrant closure of the premises as a public nuisance.

On appeal from the trial court's order of closure, the owners of "Easy Street" argued that the order of abatement unconstitutionally infringed upon its First Amendment rights as a "prior restraint" of their protected activities of showing pornographic films and nude dancing. In affirming the order of closure, at page 71, the Court of Appeal applied the same rationale as was used by the Court of Appeal in the "Sarong Gals" case noted above.

D. THE TEN YEAR HISTORY OF THE LITIGATION BETWEEN THE CITY OF SANTA ANA AND THE MITCHELL BROTHERS' THEATRE IN SANTA ANA CLEARLY ESTABLISHES THAT SANTA ANA PUBLIC NUISANCE ORDINANCE NS 1325 (AND ITS COUNTERPART PADUCAH PUBLIC NUISANCE ORDINANCE 83-6-2388) AS APPLIED, DOES NOT IMPOSE A "PRIOR RESTRAINT."

During the 1981, 1982, and 1985 October Terms of Court, Amicus Curiae City of Santa Ana, attempted, without success, to place this same so-called "closure" issue and the same basic propositions of law before this Court for resolution. The issues presented in the Santa Ana City Attorney's petitions, involving an application of Santa Ana Public Nuisance Ordinance NS 1325 to the operation of the Mitchell Brothers theater in Santa Ana, are substantially the same as the City of Paducah's petition for writ of certiorari regarding the constitutionality of Paducah Public Nuisance Abatement Ordinance 83-6-2388. See "Petition for Writ of Certiorari" in People ex rel. Cooper, City

Attorney of the City of Santa Ana v. Mitchell Brothers' Santa Ana Theater, et al., October Term 1981, No. 81-271; "Petition for Writ of Certiorari" in Edward Cooper, City Attorney of Santa Ana v. Mitchell Brothers' Santa Ana Theater, et al., October Term 1982, No. 82-345; "Petitioner's Reply and Supplemental Brief" in No. 81-271; "Petitioner's Motion for Leave to File Out-of-Time Petition for Rehearing, With Petition for Rehearing Annexed," October Term 1981, No. 81-271; "Petition for Writ of Certiorari" in People of the State of California ex rel. Cooper, City Attorney of the City of Santa Ana v. Mitchell Brothers' Santa Ana Theater, et al., October Term 1985, No. 85-439; and "Petition for Rehearing" October Term 1985, No. 85-439.

The ten year history of litigation between the City of Santa Ana and the Mitchell Brothers' Theater in Santa Ana

is set forth in a declaration of James J. Clancy, filed in such Orange County litigation, a copy of which has been filed with this Court as Exhibit 3 to Santa Ana's "Motion to Allow Amicus Curiae City of Santa Ana to Argue" in Arcara, District Attorney of Erie County, Petitioner v. Cloud Books, Inc., etc., et al., supra. A copy of said declaration is also attached as Appendix "B" to this amicus curiae brief. That history clearly establishes that Santa Ana Public Nuisance Ordinance NS 1325 has not resulted in the imposition of a "prior restraint", nor would its equivalent counterpart, Paducah Ordinance 83-6-2388.

During the above ten year period, the trial courts in 3 trials on the merits have refused to confirm the City Council's license revocation, notwithstanding those trial courts also found that all of the motion picture films which were adjudicated

(total of 51 films and 8 previews) were hard-core pornography in violation of the California State Obscenity Statutes. Further, during that period of time, the theater has continued to operate, uninterrupted, from 9:45 a.m. to midnight (12:00 a.m.) for 365 days of each of those years.

E. THE U.S. DISTRICT COURT'S HOLDING THAT A CITY DOES NOT HAVE THE POWER TO DECLAREA PLACE OF BUSINESS WHICH IS A MANUFACTORY OF OBSCENITY TO BE A PUBLIC NUISANCE IS CLEAR ERROR. THAT SAME ERROR IS THE UNDERLYING CAUSE FOR SANTA ANA'S LITIGATION PROBLEMS IN THE CALIFORNIA COURTS.

The rationale given by the trial court in each of the three cases discussed above, was the same as that given by the U.S. District Court in City of Paducah et al. v. Investment Entertainment, Inc., ie., that a City cannot declare a place of business which is alleged to be a "manufactory of obscenity" to be a public nuisance. See Petition for Writ of Certiorari, at Appendix B-12 and B-17 and B-18, reading

in part:

> "Investment does contend that Ordinance No. 83-6-2388 declares property to be a public nuisance in a way which impermissibly punishes non-obscene, protected speech. The court agrees"; and,
>
> "On the other hand, non-obscene materials are entitled to great protection, and therein lies the danger of Ordinance No. 83-6-2388. By going beyond the obscene materials themselves and focusing on the place where the obscene materials are sold or exhibited, the ordinance improperly intrudes upon protected expression. Because of this focus on places rather than materials, the court finds that Section 19-152(A) and (B) and Section 19-153(A) are unconstitutional."

The federal questions have been framed in the City of Paducah's petition for writ of certiorari as follows:

> (a) Whether The City Of Paducah, Under Its Nuisance Abatement Powers, Has The Power To Enact A Procedural Public Nuisance Ordinance Which Declares A Place Of Business In Which Obscene Publications Constitute Either: (1) All Of The Stock In Trade, Or (2) A Principal Part Of The Stock In Trade, To Be A Public Nuisance Per Se; and;
>
> (b) Whether Under Such A Procedural Public Nuisance Ordinance, The City May Act To Revoke All Licenses And Permits Of Such

Business Where: (1) No Criminal Proceedings May Be Brought For Transacting Business Without A License Unless And Until The Existence Of Such Public Nuisance Has Been Established At A Trial On The Merits, And The License Revocation Confirmed By A Decree Of The McCracken Circuit Court In Judicial Proceedings Brought By The City For That Purpose, Within Five (5) Days After Passage Of Said Resolution; And Where: (2) The Trial Judge Has Equitable Discretion To Confirm Or Deny Such License Revocation?

It seems clear to Amicus Curiae City of Santa Ana that, as a matter of "hornbook law", both of the above questions must be answered in the affirmative as powers which are derived from an inherent right of government under the Common Law. Further, U.S. v. O'Brien, 391 U.S. 367 is inapposite. O'Brien has no relevancy to a City Ordinance which is directed at imposing common law sanctions on a place of business which is a "manufactory of obscene materials". By definition, such a place is a "non-expressive activity".

The unsupported assertion of the California trial courts that a City may not declare a place of business which is a "manufactory of obscenity" to be a public nuisance is a fallout resulting from "speculation" by the California Supreme Court ten years ago in its second opinion in People ex rel. Busch et al. v. Projection Room Theater et al., 17 Cal.3d 42 (1976) as to what this court would decide after argument on the "closure" issue. In its first opinion in Busch, a majority of the California Supreme Court (4-3) held in 128 Cal.Rptr. at 239, in part:

> "We express no opinion upon the further question whether the Court may, in addition either close the premises entirely or enjoin further 'obscene' exhibitions regarding materials not yet adjudged obscene. Several cases suggest that such further forms of relief would be appropriate and constitutionally permissible..."
>
> "Since the United State Supreme Court has not yet spoken on this difficult question, and since in this posture of the case the issue is not before

> us, we leave the question open for further consideration."

Thereafter, however, the Court granted a rehearing and with Chief Justice Wright changing his vote to recast a 4-3 majority into a 5-2 majority, thereafter omitted the above portion of the first opinion and, in place thereof inserted the following text, in which the California Supreme Court "speculated" on what this Court would do when it faced the "closure" issue:

> "We are aware of no reported cases authorizing the closing of a bookstore or theater, even after it has been repeatedly determined judicially in a full adversary hearing that all or substantially all of the magazines or films exhibited or sold therein are obscene. Indeed plaintiffs have directed our attention to no such precedents, have presented nothing to countermand or distinguish the authorities referred to above, and at oral argument stated they could find no authority justifying the closing of bookstores in such circumstances. While we have concluded that a court of equity, having determined particular magazines or films to be obscene, after a full adversary hearing, may enjoin the exhibition or sale thereof by those responsible, we emphasize that the closing of such bookstores or

> theaters, either temporarily or permanently, or the enjoining of the exhibition or sale on said premises of magazines or films not specifically so determined to be obscene, constitutes an impermissible prior restraint in violation of the First and Fourteenth Amendments to the United States Constitution.
>
> "We therefore hold that abatement in the present action must be directed to particular books or films which have been adjudged obscene following a fair and full adversary hearing, rather than against the premises in which the material is sold, exhibited or displayed." (our emphasis).

Although neither the Busch trial record nor the court's opinion contemplated the validity of a city ordinance which declared a place of business which is a "manufactory of obscenity" to be a per se public nuisance, as here, the second Busch decision, with its unsupported "speculation" became the leading case authority which California Courts have followed without qualification. This has come about even though the language of the Court's first opinion, noted above,

clearly demonstrates that the rule of law expressed in the second opinion is both "dictum" and "speculation".

(F) BECAUSE OF THE CONFUSION WHICH PRESENTLY EXISTS AS TO THE LEGAL STATUS OF THE FEDERAL "CLOSURE" ISSUE, THE CITY OF SANTA ANA HAS BEEN DEPRIVED OF RESTITUTIONARY COSTS OF ABATEMENT TO WHICH IT WOULD OTHERWISE BE ENTITLED, AND ITS ABILITY TO CONTINUE TO FUND ITS PUBLIC NUISANCE ABATEMENT LITIGATION IS BEING SERIOUSLY QUESTIONED.

In the litigation with the Mitchell Brothers' Theater, the City of Santa Ana has taken the position: (1) that this Court's analysis and reasoning in Arcara v. Cloud Books, Inc., 475 U.S. ____, 87 L.Ed.2d (July 7, 1986) demonstrates that the "speculation" by the Busch Court in its second opinion (5-2) as to what this Court will hold after argument on the issue of closure of a theater which exhibits nothing but pornographic films is in error; and (2) that the California judiciary may not bar the City from making such

argument, as plaintiff is required to do in perfecting its appeal on the federal issue. See Supreme Court Practice, Stern, Gresmann and Shapiro, Sixth Edition at page 144 et seq. entitled "Need For Properly Raising A Substantial Federal Question". The note of jurisdiction in Idaho ex rel. Kidwell, 454 U.S. 1170, 71 L.Ed.2d 291, 102 S.Ct. 996; appeal dismissed on appellants' motion in 455 U.S. 1009, 71 L.Ed.2d 878, has established that the issue of closure herein is a substantial federal question.

As a result of this confusion as to the legal status of the "closure" issue, Orange County Superior Court Judge Claude D. Owens on July 31, 1986 entered an order denying the City's claim for reimbursement for costs of abatement and attorney's fees in Case No. 29-91-83 and 31-55-93, pursuant to Civil Code Section 3496. Those two trials involved 28 days

of trial and resulted in judicial findings of fact that all of the 51 motion picture films and 8 previews which were under adjudication were hard-core pornography under California Law. See, in this regard, the history of those cases set forth in Appendix B-11 through B-22 to this Amicus Curiae Brief.

Civil Code Section 3496, under which the City can claim restitution for expenditures incident to a successful abatement, provides in part, as follows:

> § ~~3496~~. (Costs and fees in obscenity cases) In any of the following described cases, the court may award costs, including the costs of investigation and discovery, and reasonable attorneys' fees, which are not compensated for pursuant to some other provision of law, to the prevailing party;
>
> (a) In any case in which a governmental agency seeks to enjoin the sale, distribution, or public exhibition, for commercial consideration, of obscene matter, as defined in Section 311 of the Penal Code.

Judge Owens based his adverse ruling regarding the City's right to restitution for its costs of abatement on the fact that the City Council's license revocation, which the City had requested be "confirmed", could not be confirmed under federal law, and the City's defeat on that federal issue prevented the City from being the "prevailing party" for purpose of recovering under Civil Code Section 3496. Judge Owens ruling in that regard was:

> "In case No. 29-91-83 and 31-55-93, neither side prevailed, for both sides only partially recovered what they sought. Plaintiff succeeded in having enjoined the showing of many films. This took most of the trial time. Defendants succeeded in having the prayer for license revocation denied. Which aspect was more significant would depend upon one's point of view."

A copy of the Reporter's Transcript for July 31, 1986 is attached as Appendix "C" to this Amicus Curiae Brief.

At the present time, the City's fifth lawsuit, People ex rel. Cooper v. Mitchell Brothers' Santa Ana Theater et al., Orange County Case No. 45-80-37, involving the City's allegations that the Mitchell Brothers have been exhibiting obscene films continuously for the past ten years, is in Dept. 1 awaiting an assignment to a trial court for a hearing on a preliminary injunction against 17 programs (35 films). Also awaiting assignment are preliminary injunction hearings on the City's sixth through thirtieth lawsuits (25 weekly lawsuits, seeking an abatement of one program of 3 films, which have been filed for the 25 weeks subsequent to February 3, 1986) involving 75 films. In these lawsuits, the City is placed upon the horns of a dilemma in that, if it persists in its claims that "license revocation" under Santa Ana Ordinance NS 1325 is constitutional as applied to the Mitchell Brothers

trial facts, the City may lose its claim for reimbursement of costs of abatement under Civil Code Section 3496, as did occur in the case of Judge Claude D. Owen's ruling after trial in People ex rel. Gow v. Mitchell Brothers' Santa Ana Theather Case No. 29-91-83 and No. 31-55-93. This dilemma has jeopardized the City's ability to continue to fund the public nuisance abatement litigation against the Mitchell Brothers' Santa Ana Theater. See the two Orange County Register News Articles dated Sunday, August 17, 1986 which reported on the present situation in Santa Ana, entitled "After 10 years, Santa Ana questions its fight" and "The Mitchell Brothers From Small-town U.S.A. to big-time pornography" at Appendix "D".

G. THE PRINCIPLES EXPRESSED BY THIS COURT IN ARCARA REQUIRE THAT QUESTIONS 2(a) AND 2(b) OF THE PADUCAH PETITION BE ANSWERED IN THE AFFIRMATIVE AS TO PADUCAH PUBLIC NUISANCE ABATEMENT ORDINANCE 83-6-2388.

Amicus Curiae City of Santa Ana contends that Chief Justice Burger's analysis in Arcara, District Attorney of Erie County v. Cloud Book, Inc. et al., 475 U.S. ____, (July 7, 1986), when considered in the light of Santa Ana Public Nuisance Abatement Ordinance NS 1325 as applied to the Mitchell Brothers' Santa Ana Theater trial facts, and its counterpart Paducah Public Nuisance Abatement Ordinance 83-6-2388, requires that Questions 2(a) and 2(b) of the City of Paducah Petition for Writ of Certiorari noted above at page 14-15 be answered in the affirmative. Amicus contends that the Arcara analysis confirms the common law principle that the license of a "manufactory of obscene materials", such as a pornographic theater or a pornographic bookstore, to operate at a specific location can be revoked by a city government on the ground that such businesses present a health (moral) public

nuisance.

In Arcara, Chief Justice Burger's analysis held that a legislative body could mandate closure (limit an equity judge's discretion) upon proof that a public nuisance, based upon lewd sexual conduct in three-dimension form, was found to exist, and that:

> "First Amendment values may not be invoked by merely linking the words 'sex' and 'books'." and
>
> "The First Amendment is not implicated by the enforcement of a public health regulation of general application against the physical premises in which respondents happen to sell books." (Our emphasis).

An analogous "precedent" for the "logic" applied in the Arcara analysis can be found in the opinion of Chief Justice Bakes, speaking for a unanimous Idaho Supreme Court in Idaho ex rel. Kidwell v. U.S. Marketing, Inc., 102 Idaho 431. See the annotation re Idaho ex rel. Kidwell in 25 ALR 4 at 381-412, entitled

"Validity and Application of Statute Authorizing Forfeiture of Use or Closure of Real Property From Which Obscene Material Has Been Disseminated or Exhibited" and see in particular, the discussion on "Prior Restraint" at 25 ALR 4, pages 388-391.

The three-dimensional lewd conduct which was the basis for the Moral Public Nuisance and which authorized closure in Arcara has a significant impact upon the analysis of the California Supreme Court in Busch and for the following reasons: The "obscenity" (two dimensional) public nuisance analysis in Busch, 17 Cal.3d 42 (June 1, 1976), was decided by a legal analysis which is predicated upon the lewdness (three-dimensional) analogy. The Busch Court first re-affirmed its prior decision in People v. Lim, 18 Cal.2d 872, 879 (1941) which had upheld the Court of Appeal decision in Weis v. Superior Court,

30 Cal.App. 730 (1916) that an exhibition known as the "Sultan's Harem", conducted at the Panama-California International Exhibition, involving the "indecent and offensive" exposition to members of the public of the "naked persons and private parts thereof" of various female employees (in three-dimension), constituted a public nuisance subject to abatement. People ex rel. Busch, supra, 17 Cal.3d at 50. The Court then reasoned by analogy and held that there was no satisfactory distinction which would justify a differential distinction of "live" performances on the one hand (three-dimensional) and "pictorial" representations in film on the other (two-dimensional), and the presentation of either may fairly be described as "indecent" and equally injurious to public morals, People ex rel. Busch, supra, 17 Cal.3d at 50, 54. Both are "per se" public nuisances, 47

Cal.Jur.3d 214. See Busch at page 50 and 54 where the Court held:

> "While carefully noting that Weis involved live performances, we discern no satisfactory distinction which would justify differential treatment of the pictorial representations in obscene magazines and films on the one hand, and 'live' performances on the other. The presentation of either may fairly be described as 'indecent' and equally injurious to public morals..."

and

> "The Court explained that 'if any semblance of civilization is retained in our country, the states must have standards of conduct permissible in public. There is little difference in the effect on the public between lewd conduct in public areas and lewd conduct explicitly performed on a motion picture screen for the viewing of the public...'"

Applying the same analogous reasoning as was applied in Busch to Arcara, if a finding of lewd (three-dimensional) sexual conduct as a course of conduct at a specific location in Arcara can be made to "mandate" closure of the premises, then it also must follow that a finding of a course

of conduct of exhibiting nothing but obscene (two-dimensional) sexual conduct at a specific locale for ten years can authorize a judge to "confirm" a legislative ordinance which holds that such a place is a public nuisance as to which the license must be revoked.

H. THE POWER TO ABATE MORAL PUBLIC NUISANCES, BASED UPON A CONSISTENT PATTERN OF ILLEGAL ACTIVITY IN THE FORM OF EITHER "LEWD CONDUCT" OR "TRADING IN OBSCENITY", IS AN INHERENT POWER IN GOVERNMENT WHICH MAY NOT BE QUALIFIED, IF THE PUBLIC NUISANCE IS FOUND TO EXIST.

Amicus Curiae submits that the confusion which has caused several courts to error and to subject public nuisance abatement legislation involving "closure" to the O'Brien test is the common failure of most courts generally to properly analyze and give recognition to the basic principle that the power to abate moral public nuisances itself is an inherent power in government which may not be qualified if the moral public nuisance is determined to exist. If the courts of this nation are to be equipped to cope with this growing national problem of moral public nuisances, this Court's opinion must direct the attention of the judiciary

to this fundamental principle. In this regard, more than a century ago, this Court pointed out in James Phalen v. Commonwealth of Virginia, 12 L.Ed. 1030, 1033 (1850):

> "The suppression of nuisances injurious to public health or morality is among the most important duties of government. . . It is a principle of the common law, that the king cannot sanction a nuisance."

Even more anciently, our Anglo-Saxon legal system has described its own function as: "the Courts are the guardians of the public morals" Rex v. Curl, 2 Strange 789 (1727): Sir Charles Sedley's case 1 SID 168.

1. UNDER THE COMMON LAW AND THE STATUTORY LAW ON "NUISANCES" IN MOST STATES, THE TERM "PUBLIC NUISANCE" EMBRACES BOTH THE "MORAL" PUBLIC NUISANCE, SUCH AS TRADING IN "LEWD CONDUCT" AND/OR "OBSCENITY" WHICH IS OFFENSIVE TO THE MORAL SENSE, AND THE "PHYSICAL" PUBLIC NUISANCE WHICH IS OFFENSIVE TO ONE OF THE 5 PHYSICAL SENSES.

From the earliest days of Anglo-Saxon law, a "moral" nuisance has been abatable as a public nuisance. At common law, both lewd conduct and trading in obscenity was regarded as a "moral" public nuisance. See H.G. Wood, the Law of Nuisances, section 57, at page 77 and section 65 at page 85:

> "57. Indecent exposure of one's person in public place, a public nuisance - As has previously been stated, anything that is offensive to the morals of society, or that is indecent, is a public nuisance. Therefore, any indecent exposure of one's person in a public place, in the presence of several persons, is a public nuisance, and indictable and punishable as such at common law. It is a nuisance because it shocks the moral sensibilities, outrages decency, and is offensive to those feelings of chastity that people of ordinary respectability entertain. . . ."

> "65. Selling obscene picture books, etc. Common nuisance - So, too, all obscene pictures, prints, books or devices are common nuisances, and any person having them in his or her possession for the purpose of exhibition or sale may be indicted therefore at common law,

> because they are clearly in derogation of public morals and common decency. Commonwealth v. Holmes, 17 Mass. 336; Commonwealth v. Sharpless 2 S and R (Penn.) 91; 7 Am. Dec. 632."

This common law rule as to moral public nuisances has been codified in most states through adoption of the Field Code in 1872. See, for example, California Civil Code sections 3479 and 3480.

2. A "MORAL" NUISANCE IS A "PER SE" PUBLIC NUISANCE. "LEWD CONDUCT" AND THE "COMMERCIAL DISTRIBUTION OR EXHIBITION OF OBSCENE MATTER" IS A PER SE PUBLIC NUISANCE (AS A MATTER OF LAW)-- NO FURTHER PROOF BEYOND THE FACT OF "LEWD CONDUCT" OR "OBSCENITY" IS REQUIRED. THE POWER TO ABATE THE SAME IS INHERENT IN GOVERNMENT, WHICH IS UNDER AN OBLIGATION TO REMOVE THE "MORAL" NUISANCE.

A "per se" public nuisance is described in 47 Cal.Jur.3d at 214, as follows:

> "Certain activities or conditions are considered nuisances under all circumstances, and are therefore termed nuisances 'per

> se' as distinguished from so - called nuisances 'in fact.' Nuisances per se are so termed because no proof is required, beyond the actual fact of their existence, to establish that they are nuisances. No proof of ill effects is necessary. . ."

See also Harris v. U.S., 315 A.2d 569 at 572 footnote 9 (February 11, 1974), wherein an en banc District of Columbia Court of Appeals, in facing a similar question, reversed the trial court judgment and defined a "nuisance per se" as a structure or activity which is a nuisance at all times and under any circumstances. Proof of the act or the existence of the structure establishes the nuisance as a matter of law.

In addressing himself to the public morals issue and the preeminent power of local government to control the same, Woods describes the danger to the environment as being in the nature of a "nuisance per se." See "The Law of Nuisances" by H. G. Wood, Sections 23 and

24, at pages 45-46:

"Section 23. Acts affecting public morals, public nuisances per se, when. - There are classes or kinds of businesses which are nuisances per se, and the very fact that they are carried on in a public place is prima facie sufficient to establish the offense. But in such cases, if the respondent questions that the use of his property in the manner charged in the indictment produces the effects set forth therein, and introduces evidence to sustain his position, it then becomes necessary to prove that the effects are such as are charged. But there are a class of nuisances arising from the use of real property and from one's personal conduct that are nuisances per se, irrespective of their results and location, and the existence of which only need to be proved in any locality, whether near to or far removed from cities, towns, or human habitations, to bring them within the purview of public nuisances. This latter class are those intangible injuries which affect the morality of mankind, and are in derogation of public morals and public decency."
"Section 24. Wrongs malum in se. - The class of nuisances are of that aggravated class of wrongs that, being malum in se, the courts need no proof of their bad results and require none. The experience of all mankind condemns any occupation that tampers with the public morals, tends to idleness and the promoition of evil manners, and anything that

> produces that result finds no encouragement from the law, but is universally regarded and condemned by it as a public nuisance." (Our emphasis.)

The municipal power to protect the environment is inherent in government itself and is so basic that its grant of authority is said to be "implied," and to flow from the Common Law rather than from "express" provisions in the City's Charter or the General Laws of the State. See "The Law of Nuisances," Wood, Section 743, at page 972.

> "Section 743. No control over nuisances without special power. - Therefore, a municipal corporation has no control over nuisances existing within its corporate limits except such as is conferred upon it by its charter or by general law. There can be no question, however, but that where a nuisance exists within its corporate limits that is clearly a nuisance at common law or by statute, which is detrimental to the health of the inhabitants, it may be abated by the authorities, but it must be a nuisance at common law and one which any person injured thereby might lawfully abate of his own motion, or in the absence of express or implied authority given,

> the removal or abatement of the nuisance would be unlawful. Where the thing abated is clearly a nuisance, and one which affects the health of the city, the abatement may be made by the authorities or by any persons injured thereby. The common law in such a case comes in aid of the authorities and they are justified in the act, not because they are officials of the city, but because they are citizens injured by the thing abated." (Our emphasis.)

Joyce, in his treatise "Law of Nuisance," Section 345, notes that this common law power entrusts the municipal corporation with not only the right but the obligation to remove the nuisance; at page 498:

> "The rule is declared to be settled, without dissent, that, without a special grant of authority, public corporations may, as a common law power, cause the abatement of nuisances, and if the nuisance cannot otherwise be abated, may destroy the thing which constitutes it. And it is said that a municipal corporation has not only the right, but is also under the obligation, to remove nuisances which may endanger the health of its citizens; that it has the power to decide in what manner this shall be done; and that its decision is

conclusive unless it transcends the power conferred by the charter or violates the constitution."

3. MUGLER V. KANSAS, 123 U.S. 205, AUTHORIZES "CLOSURE" OF MORAL "PER SE" PUBLIC NUISANCES.

This Court has previously stated that "The suppression of nuisances injurious to public health or morality is among the most important duties of government. . . ." See James Phalen v. The Commonwealth of Virginia, supra, and that the jurisdiction of the Equity Court to deal with the same is "salutary." Mugler v. Kansas, 123 U.S. 205 (Dec. 5, 1887). In Mugler, supra, this Court specifically held that Equity Courts do have the power to enter summary interlocutory abatement "closure" orders in proper cases. There, a petition had been filed in the Kansas State Court under the thirteenth section of a statute asking (1) that a

group of buildings, constituting the brewery of the defendants, be adjudged a common nuisance, and the sheriff directed to shut up and abate the same, and (2) that the defendants be enjoined from using the premises. The petition was thereafter removed to the federal court and dismissed on the grounds that the "closure" remedy violated due process. On appeal, the U.S. Supreme Court reversed, holding at page 214:

> "Equally untenable is the proposition that proceedings in equity for the purposes indicated in the thirteenth section of the statute are inconsistent with due process of law. 'In regard to public nuisances,' Mr. Justice Story says, 'the jurisdiction of courts of equity seems to be of a very ancient date, and has been distinctly traced back to the reign of Queen Elizabeth. The jurisdiction is applicable not only to public nuisances, strictly so called, but also to purprestures upon public rights and property. . . In case of public nuisances, properly so called, an indictment lies to abate them, and to punish the offenders. But an information also lies in equity to redress the grievance by way of injunction.' 2 Story, eq. Section 921, 922. The ground of this

> jurisdiction in cases of purpresture, as well as of public nuisances, is the ability of courts of equity to give a more speedy, effectual, and permanent remedy than can be had at law. They cannot only prevent nuisances that are threatened and before irreparable mischief ensues, but arrest or abate those in progress, and, by perpetual injunction, protect the public against them in the future; whereas, courts of law can only reach existing nuisances, leaving future acts to be the subject of new prosecutions or proceedings. This is a salutary jurisdiction, especially where a nuisance affects the health, morals or safety of the community. Though not frequently exercised, the power undoubtedly exists in courts of equity thus to protect the public against injury."

4. THE CLAIM THAT THE "CLOSURE" WHICH WAS AUTHORIZED IN MUGLER V. KANSAS CANNOT BE APPLIED TO A COMMERCIAL BUSINESS WHICH HAS BEEN TRAFFICKING CONTINUOUSLY IN LEWD CONDUCT OR OBSCENITY IS A "MYTH".

The claim that the "closure" authorized in Mugler v. Kansas cannot be applied to a commercial business which is trafficking in lewd conduct or obscenity has been perpetuated by the general reluctance of this Court to de-

cide any issue in the abstract. This Court's refusal to act on the abstract issue has been full blown into a myth that has no basis in case law. See, for example, the dissent of Associate Justice White on denial of Petition for Writ of Certiorari in Avenue Book Store v. City of Tallmage, Ohio, 459 U.S. 997.

In Art Theater Guild, Inc. v. Ohio ex rel. Ewing, supra, this Court "dismissed for want of a substantial federal question" an appeal from the Ohio Supreme Court's decision in Ohio ex rel. Ewing v. "Without A Stitch," 307 N.E.2d 911. A review of the Ohio Supreme Court decision at pages 917-918, clearly shows that an order closing a theater which exhibited a single obscene motion picture film for a substantial period of time is constitutionally valid, at least where a good faith owner could obtain a release by (a)

appearing in court, (b) filing a bond in the full value of the property, and (c) demonstrating to the Court that he would prevent the nuisance from being reestablished (where the "nuisance" is regarded as being the exhibition of the particular film declared to be obscene).

In Huffman v. Pursue, Ltd., 420 U.S. 592, 43 L.Ed.2d 482, 95 S.Ct. 1200, this Court again had occasion to refer to the "closure" provision of the Ohio Statute. There, the Court noted at page 497, that the narrowing construction of the Ohio Supreme Court in Ohio ex rel. Ewing v. A Motion Picture Film Entitled "Without A Stitch," supra, avoided the constitutional difficulty which concerned the federal trial court in the Huffman case, and, that the case did not fit "within the exception for statutes which are flagrantly and patently violative of express consti-

tutional prohibitions.'" See also Huffman v. Pursue Ltd., supra, footnote 23 at 420 U.S. 612, which comments favorably upon the "closure" provision of the Ohio Red Light Abatement Statute, Ohio Rev. Code Section 3767.04 and Section 3767.06.

The conclusion that, under no circumstances, may a "padlock" penalty be issued does not follow from either of the above decisions. Because this Court has said that an activity is "presumptively protected" does not, in logic, require a conclusion that the presumption is conclusive! The fallacy of applying such a rule to businesses which continuously exhibit lewd "conduct" is logically demonstrated in the lengthy and comprehensive opinion of Associate Justice Burke, which Amicus Curiae recommends to the members of this Court as a classical statement in this area of the law,

speaking for the majority of the New York Court of Appeals in Trans-Lux Dist. Corp. v. Bd. of Regents, 248 N.Y.S. 2d 857 (Mar. 26, 1964). See, for example, at page 860:

> "If we can accept the obvious -- that sexual intercourse whether performed in the park or simulated on the stage or screen is in itself a form of conduct (in which the public have an interest), it is apparent that when this defendant chooses to use it as a vehicle for the expression of art it has 'brigaded' the communication (to the extent that it is 'communication') with conduct completely. In so doing the petitioner has subjected itself to such regulations as are appropriate to the conduct when engaged in for reasons having nothing to do with expression. There is otherwise no difference between advocacy and action. (Compare Thornhill v. Alabama, 310 U.S. 88, 60 S.Ct. 736, 84 L.Ed. 1093, with Local Union No. 10, etc., Plumbers Union v. Graham, 345 U.S. 192, 73 S.Ct. 585, 97 L.Ed. 946). 'Freedom of expression can be suppressed if, and to the extent that, it is so closely brigaded with illegal action as to be an inseparable part of it.' (Douglas, J., dissenting in Roth v. United States, 354 U.S. 476, 514, 77 S.Ct. 1304, 1324, 1 L.Ed.2d 1498)."

CONCLUSION

For the foregoing reasons, the City of Paducah et al's. Petition for Writ of Certiorari to the United States Court of Appeals for the Sixty Circuit should be granted as prayed for in the Petition.

DATED: August 26, 1986

Respectfully submitted,

EDWARD COOPER,
Santa Ana City Attorney

JAMES J. CLANCY,
Counsel of Record for
Amicus Curiae

CERTIFICATE OF SERVICE

I, hereby certify that on this 26th day of August, 1986, the original and 40 copies of the within Amicus Curiae Brief of the City of Santa Ana, California, were deposited in the United States Post Office in Sun Valley, California with first-class postage prepaid, and properly addressed to the Clerk of the United States Supreme Court.

I further certify that three (3) copies were also mailed, postage prepaid, to the below listed parties to the proceedings and that all parties required to be served have been served.

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APPENDIX "A"

COMPARISON OF SANTA ANA PUBLIC NUISANCE ORDINANCE NS 1325 (INVOLVED IN SANTA ANA, CALIFORNIA PUBLIC NUISANCE LITIGATION) AND PADUCAH PUBLIC NUISANCE ORDINANCE 83-6-2388, SHOWING THE SANTA ANA AND PADUCAH ORDINANCES TO BE IDENTICAL.

(Reference: Amicus Curiae Brief of the City of Santa Ana, California in Support of Petitioners, at page 3, line 18.)

COMPARISON OF -
SANTA ANA MUNICIPAL CODE: . . .

Section 12-102. LEWD FILMS AND THEATRES EXHIBITING THE SAME DECLARED A PUBLIC NUISANCE; ABATEMENT THEREOF.

(A) Any and every place in the City of Santa Ana where:

(1) lewd films are publicly exhibited as a regular course of business, or possessed for the purposes of such exhibition; or

(2) a lewd film is publicly and repeatedly exhibited, or possessed for the purpose of such exhibition, is a public nuisance.

(B) Any and every lewd film which is publicly exhibited or possessed for such purpose at a place which is a public nuisance under this section, is a public nuisance per se.

. . . AND PADUCAH ORDINANCE 83-6-2388

Section 19-152. OBSCENE FILMS AND THEATERS EXHIBITING THE SAME DECLARED A PUBLIC NUISANCE PER SE; ADMISSION PRICE RECEIVED AFTER SERVICE OF RESOLUTION TO BE REGARDED AS A PUBLIC NUISANCE PER ACCIDENS.

The following are declared to be public nuisances per se:

(A) Any and every place in the City of Paducah where obscene films are publicly exhibited as a regular course of buisness, or possessed for the purpose of such exhibition;

(B) Any and every place in the City of Paducah where an obscene film is publicly and repeatedly exhibited, or possessed for the purpose of such exhibition; and

(C) Any and every obscene film which is publicly exhibited or possessed for such purpose at a place which is a public nuisance under this section.

COMPARISON OF -
SANTA ANA MUNICIPAL CODE: . . .

Section 12-104. ACTION TO BE TAKEN BY CITY COUNCIL.

Upon a specific finding that a public nuisance, as defined in Section 12-102 hereof, exists in the City of Santa Ana, the City Council, in applying the provisions of this ordinance to such nuisance, shall provide for the following by Resolution:

(A) Declare the fact that such nuisance exists;

(B) Set forth the description or legal description and street address of the real property which constitutes the nuisance;

(C) Set forth a statement of facts upon which the City Council declaration of nuisance is based;

(D) Order the revocation of all licenses and permits which have been

. . . . AND PADUCAH ORDINANCE 83-6-2388

Section 19-155. ACTION TO BE TAKEN BY BOARD OF COMMISSIONERS.

Upon a specific finding that a public nuisance, as defined in Section 19-152 or Section 19-153 of the Code of Ordinances of the City of Paducah, exists in the City of Paducah, the Board of Commissioners, in applying the provisions of this ordinance to such nuisance, shall provide for the following by resolution:

(A) Declare the fact that such nuisance exists;

(B) Set forth the description or legal description and street address of the real property which constitutes the nuisance;

(C) Set forth a statement of facts upon which the Board of Commissioners' declaration of nuisance is based;

(D) Order the revocation of all licenses and permits which have been

COMPARISON OF -
SANTA ANA MUNICIPAL CODE: . . .

issued as a part of the operation of such business, subject to confirmation by the Court in the judicial proceedings required herein. Criminal proceedings for transacting business without a license at such address shall not be filed until the order of license revocation by the City Council has been confirmed by judicial order.

Section 12-105. ACTION TO BE TAKEN BY CITY ATTORNEY.

Upon a specific finding by Resolution of the City Council of the fact that a public nuisance exists at a particular location, the City Attorney shall:

(A) Forthwith, but not later than five working days after passage of said Resolution, commence legal proceedings under Civil Code Sections 3491 and 3494 and Code of Civil Procedure Section 731,

issed as a part of the operation of such business, subject to confirmation by the court in the judicial proceedings required herein. Criminal proceedings for transacting business without a license at such address shall not be filed until the order of license revocation by the Board of Commissioners has been confirmed by judicial order.

Section 19-156. ACTION TO BE TAKEN BY DISTRICT ATTORNEY.

Upon a specific finding by resolution of the Board of Commissioners of the fact that a public nuisance exists at a particular location, the Corporation Counsel shall:

(A) Forthwith, but not later than five (5) working days after passage of said resolution, commence legal

by the filing of a civil action seeking the following relief:

(1) An Order that the motion picture or pictures named by the City Council are lewd, as defined herein;

(2) An Order that the place named by the City Council where the film or films are being exhibited is a public nuisance and that the action taken by the City Council to revoke the licenses issued to that place of business was lawful.

proceedings by the filing of a civil action seeking the following relief:

(1) an order that the subject matter identified by the Board of Commissioners in said resolution is obscene as defined herein;

(2) an order that each place named by the Board of Commissioners is a public nuisance and that the action taken by the Board of Commissioners to revoke the licenses issued to that place of business was lawful.

APPENDIX "B"

DECLARATION OF JAMES J. CLANCY FILED ON MARCH 25, 1986 IN CASE NO. 48-49-38, SETTING FORTH THE MATTERS OF RECORD IN THE TEN YEARS OF PUBLIC NUISANCE ABATEMENT LITIGATION BETWEEN THE CITY OF SANTA ANA AND THE MITCHELL BROTHERS' SANTA ANA THEATRE.

(Reference: Amicus Curiae Brief of the City of Santa Ana, California in Support of Petitioners, at page 12, line 10.

JAMES J. CLANCY
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(818) 352-2069
Attorney for Plaintiff

FILED
MAR. 25, 1986
GARY L. GRANVILLE, County Clerk
By _____ Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ORANGE

PEOPLE OF THE STATE OF CALIFORNIA ex rel. EDWARD COOPER, CITY ATTORNEY FOR THE CITY OF SANTA ANA, CALIFORNIA, Plaintiff, v. MITCHELL BROTHERS' SANTA ANA THEATRE located at 1565 West 17th Street, Santa Ana, County of Orange, California; CINEMA 7, INC., a California corporation, M.B.-F.G. THEATRE CIRCUIT, INC.; and DOES 1 through 5, inclusive, Defendants.	NO. 48-49-38 DECLARATION OF JAMES J. CLANCY AS TO MATTERS OF RECORD IN OTHER CASES ON FILE IN THIS COURT, IN SUPPORT OF PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION DATE: April 29, 1986 TIME: 9:30 a.m. DEPT: 21

DECLARATION OF JAMES J. CLANCY IN SUPPORT OF MOTION FOR A PRELIMINARY INJUNCTION

I, JAMES J. CLANCY, declare:

1. I am the attorney for the Plaintiff in the above-entitled action. I make this declaration in support of Plaintiff's Motion For a Preliminary Injunction, on file herein.

2. On November 27, 1976, People of the State of California ex rel. Gow, City Attorney of the City of Santa Ana, California v. Mitchell Brothers' Santa Ana Theater, et al., Civil Action No. 25-65-30 was filed in the Orange County Superior Court, alleging among other things that the real estate known as the Mitchell Brothers' Santa Ana Theater at 1565 West 17th Street was a public nuisance under Santa Ana Ordinance No. N.S. 1325, as amended by Ordinance No. N.S. 1452, in that the theater exhibited obscene motion pictures as a continuing course of conduct.

Although Plaintiff, in that case, alleged the manner of operating the theater involved a continuing public nuisance and that all of the films being exhibited were obscene, the trial court ruled that, for procedural purposes of trial, a cut off date would be established. (See Reporter's Transcript for January 12, 1977 at pages 65-67, line 6 and Reporter's Transcript for January 28, 1977, at page 5, lines 1-8).

3. Thereafter, and for the same procedural reasons, three additional complaints were filed to litigate the obscenity of other films being shown at the Mitchell Brothers' Santa Ana Theater, known as No. 28-12-14, No. 29-91-83 and No. 31-55-93, as follows:

CASE NO. AND FILMS INVOLVED	DATE FILED	PERIOD COVERED
25-65-30 25 programs (41 films)	11/02/76	9/3/75-4/12/77
28-12-14 12 programs (24 films)	12/20/77	4/13/77-7/15/78
29-91-83 13 programs (26 films)	10/03/78	7/16/78-10/26/78
31-55-93 26 programs (46 films)	06/21/79	11/6/78-8/21/79

total: 137 films

4. In all of the above lawsuits, Plaintiff has steadfastly contended and does now presently contend herein that Plaintiff has stated one cause of action for a continuing public nuisance. See Baker et al. v. Burbank-Glendale-Pasadena Airport, 39 Cal.3d 862, 218 Cal.Rptr. 293 (Sept. 23, 1985)

5. The titles of the 41 films in Case No. 25-65-30 are listed in the Complaint in Case No. 45-80-37 at pages 1-2

of Exhibit 3 (Surveillance Code No. 1-24). On January 12, 1977, Orange County Superior Court Judge Jerrold S. Oliver granted Plaintiff's motion to consolidate the final injunction and the preliminary injunction, which obviated the need for a separate hearing on the preliminary injunction. (See the Reporter's Transcript for January 12, 1977, referred to above, at page 71, lines 16-23). A judgment in No. 25-65-30 was filed by Judge Weeks on June 6, 1978 and thereafter, the trial court's findings in No. 25-65-30 that 11 films were obscene beyond a reasonable doubt were affirmed upon appeal. People of the State of California ex rel. Edward Cooper v. Mitchell Brothers' Santa Ana Theater et al., 128 Cal.App.3d 937, 940 180 Cal.Rptr. 728, 730 (1982).

6. Four appellate opinions have been filed in Case No. 25-65-30 as follows: People ex rel. Gow v. Mitchell Brothers'

et al., 114 Cal.App.3d 923, 171 Cal.Rptr. 85 (Jan. 20, 1981); reversed in California ex rel. Edward Cooper v. Mitchell Brothers' Santa Ana Theater, et al., 454 U.S. 90, 70 L.Ed.2d 262 (Nov. 30, 1981); People ex rel. Edward Cooper v. Mitchell Brothers' Santa Ana Theater et al., 128 Cal.App.3d 937, 180 Cal.Rptr. 728 (Feb. 18, 1982) (decision on remand) and People ex rel. Cooper v. Mitchell Brothers' Santa Ana Theater, 165 Cal.App.3d 278, 211 Cal.Rptr. 501 (Mar. 7, 1985) (decision on attorney's fees on appeal).

7. Case No. 28-12-14 was filed on December 20, 1977, after the jury returned its verdicts in Case No. 25-65-30 that 11 films were obscene under California law. The titles of the 24 films in Case No. 28-12-14 are listed in the Complaint in Case No. 45-80-37 at pages 2-3 (Surveillance Code No. 25 through 36). No motion for preliminary injunction was made in

Case No. 28-12-14. Subsequently, Case No. 28-12-14 was consolidated for trial with Case No. 29-92-83.

8. The titles of the 26 films in Case No. 29-92-83 are listed in the Complaint in Case No. 45-80-37 at page 4 of Exhibit 3 (Surveillance Code No. 1-78 through 13-78). On November 2, 1978, Orange County Superior Court Judge Richard D. Hamilton granted a preliminary injunction against exhibiting the 26 films after a four-day hearing. The preliminary injunction was affirmed in People of the State of California ex rel. Gow v. Mitchell Brothers' Santa Ana Theater, et al., 101 Cal.App.3d 296, 161 Cal.Rptr. 562 (Jan. 22, 1980, hearing denied May 7, 1980).

9. The titles of the 46 films in Case No. 31-55-93 are listed in the Complaint in Case No. 45-80-37 at page 5 (Surveillance Code No. 14-78 through 23-78) at page 7 (Surveillance Code No. 13-79

through 16-79) and at pages 7-8 (Surveillance Code No. 22-79 through 30-79). On January 24, 1980 after a 9-day hearing, Orange County Superior Court Judge Lester Van Tatenhove granted a preliminary injunction against exhibiting 46 films and 8 previews. The preliminary injunction was affirmed in People of the State of California ex rel. Gow v. Mitchell Brothers' Santa Ana Theater, et al., 118 Cal.App.3d 863, 173 Cal.Rptr. 476 (Apr. 16, 1981).

10. The above lawsuits were filed at the direction of the City Council, which acted by formal resolution after considering evidence in the form of the following time and motion studies and continuities which had been prepared from surveillances of films exhibited at the Mitchell Brothers' Santa Ana Theater:

CASE NO. AND FILMS CONSIDERED	RESOLUTION NO.	DATE OF ACTION
25-65-30 13 programs (25 films) Time-motion studies	76-134	10/26/76
28-12-14 12 programs (24 films) Time-motion studies	77-144	12/12/77
29-91-83 6 programs (12 films) Time-motion studies/continuities	78-131	10/02/78
31-55-93 14 programs (28 films) Time-motion studies/continuities plus judicial decisions in 2 State Courts and 1 Federal Court proceedings	79-98	06/18/79

11. In the first three of the above four cases, the City Council acted upon photographic evidence in the form of time and motion studies of the films which had been exhibited to the date of the City Council's action. In the last case (Case No. 31-55-93), the City Council in Resolution 79-98 also had before it the Findings of Fact and Conclusions of Law in Case No. 25-65-30 that 11 films were obscene, the preliminary injunction of Orange County

Superior Court Judge Richard D. Hamilton that the 26 films in Case No. 29-91-83 were obscene, and the verdict of the federal jury in the copyright case that five films ("Behind the Green Door", "Resurrection of Eve", "Inside Marilyn Chambers", "Autobiography of a Flea" and "Sodom and Gomorrah") which the Mitchell Brothers had produced, directed, distributed and exhibited at the Theater were obscene under federal law.

12. On Monday, May 6, 1985, the Santa Ana Council adopted Resolution No. 85-58 and ordered the City Attorney to take further legal action to enjoin and abate the motion picture films being exhibited at the Mitchell Brothers' Santa Ana Theatre from the date of its opening in 1975 including the films which were then being exhibited on the date Resolution No. 85-58 was adopted. Pursuant to that directive, People of the State of California ex rel.

Edward Cooper, City Attorney for the City of Santa Ana, California; City of Santa Ana, a Municipal corporation, Plaintiffs v. Mitchell Brothers' Santa Ana Theatre, et al., No. 45-80-47, was filed on May 9, 1985.

13. The City Attorney now brings this motion for a preliminary injunction as to the motion picture films which are presently being exhibited at said theater during the weeks subsequent to February 3, 1986. Subpoenaed 35MM prints, used in the projection of such motion picture films, will be offered in evidence for the Court's viewing at the hearing on Plaintiff's Motion for a Preliminary Injunction. Video tape copies of such films will also be offered as secondary evidence.

14. I further say that I have been the attorney of record in the above-described lawsuits and have been in overall charge of the weekly surveillances at the Mitchell Brothers' Theatre since the filing of the

first lawsuit on November 27, 1976. The content and character of the three features shown at this location during the past 10 years is the same. In particular, the content and character of the motion picture films shown on March 19, 1986, is the same as the motion picture films which were surveilled at the same location and autoptically recorded on previous occasions, and subsequently judged to be obscene under California law at two preliminary injunction hearings before Orange County Superior Court Judge Richard Hamilton and Lester Van Tatenhove in Case Nos. 29-91-83 and 31-55-93, and at four Court trials before Orange County Superior Court Judge Marvin Weeks in Case No. 25-65-30 (eleven [11] motion picture films judged obscene), and before Orange County Superior Court Judge Claude M. Owens in Case No. 29-91-83 (six [6] motion picture films judged obscene) and in Case No. 31-55-93 (thirty-four [34] motion picture films and eight [8] previews

judged obscene). The films and previews which were judged to be obscene in the three court trials to date are:

Case No. 25-65-30

(1) Sodom and Gomorrah
(2) Behind the Green Door
(3) Inside Marilyn Chambers
(4) Autobiography of a Flea
(5) Sensations
(6) Teenage Fantasies
(7) Teenage Cruisers
(8) French Classmates
(9) Love in Strange Places
(10) Story of Joanna
(11) Hungry Mouth

Case No. 29-91-83

(1) Teenage Pajama Party
(2) Breaker Beauties
(3) A Formal Faucett
(4) Kinky Tricks
(5) Deep Throat
(6) Devil in Miss Jones

Case No. 31-55-93

(1) The Last Fox Trot In Burbank
(2) Reflections
(3) Lollipop Palace
(4) A Taste of Sugar
(5) The Erotic Adventures of Candy
(6) Moonshine Girls
(7) Slippery When Wet
(8) French Shampoo
(9) Honey Cup
(10) Anita, The Swedish Nymphet
(11) Candy Stripers
(12) My Wife The Hooker
(13) Confessions of Linda Lovelace

(14) Visions
(15) Once Over Nightly
(16) Salon D'Amour
(17) Hot Cookies
(18) Mash'D
(19) Barbie's Fantasy
(20) C.B. Mamas
(21) Resurrection of Eve
(22) Dear Pam
(23) Slave of Pleasure
(24) It Happened in Hollywood
(25) Prisoner of Love
(26) Abduction of Lorelei
(27) Made in France
(28) Born Erect
(29) Another Love-Another Place
(30) Unwilling Lovers
(31) Come With Me My Love
(32) Souperman
(33) Teen Pony Girls
(34) One Of A Kind

Eight Previews:

(1) Candy Goes to Hollywood
(2) Hungry Young Women
(3) Candy Stripers
(4) A Taste Of Sugar
(5) Visions
(6) French Shampoo
(7) Blonde Velvet
(8) The Erotic Adventures of Candy

In no case, in either the two injunction hearings or the four trials to date, is there a judgment of a trialcourt that any one of the films which have played at the Mitchell Brothers' Theatre is not obscene. All of the judgments, to date, have been

that the films viewed by the Court and tried on the merits are obscene.

RE THE DEFENDANTS' OBJECTION TO THE INTRODUCTION OF EVIDENCE OF "OBSCENITY" UNDER THE "BEST EVIDENCE" RULE AND THE TIME AND MOTION STUDY AS SECONDARY EVIDENCE ISSUE

15. At the trial, after lengthy arguments, Judge Weeks admitted the time and motion studies in Case No. 25-65-30 as secondary evidence and granted a stay of the trial to permit the Mitchell Brothers to test that ruling in the Court of Appeal by prerogative writ in Mitchell, et al. v. Superior Court, 4 Civ. 19503. After the Court of Appeal denied the writ on October 28, 1977, and a Petition for Hearing was denied by the California Supreme Court on November 2, 1977, the defendants voluntarily produced 17 of the films in evidence and then refused to bring in the rest. Judge Weeks then reversed his ruling and excluded Plaintiff's "secondary evidence" as "prejudicial."

16. In Case No. 31-55-93, Judge Van Tatenhove admitted the time and motion studies as secondary evidence at the hearing on the preliminary injunction. At the trial, however, Judge Owens excluded the time and motion studies as secondary evidence, but admitted the same as foundational evidence to authenticate the videotape cassettes, which had been purchased upon the open market, as "copies" of the films which had been exhibited at the Mitchell Brothers' Santa Ana Theatre.

THE TRIAL OF CASE NOS. 28-12-14, 29-91-83 AND 31-55-93

17. The trial of Case Nos. 28-12-14 and 29-91-83 was held in Department 17 (Judge Owens) on June 2, 3, 8, 15, 17, 18, 22, 23, 25, 29, 30 and July 1, 1981. The Mitchell Brothers moved for a nonsuit pursuant to Civil Code, Sections 581 and 631.8 as to Case No. 28-12-14 and as to all of the films in Case No. 29-91-83, except the

six */ which were viewed by the Court. The Court granted the nonsuit as to Case No. 28-12-84 on the ground that since no evidence of the motion picture films or secondary evidence had been received, there was no evidence of obscenity and, without such evidence, the Court could not make an adjudication. The Court denied the motion for nonsuit as to Case No. 29-91-83.

18. On July 31, 1981, Judge Owens

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*/ In adopting Resolution No. 78-131, which authorized Case No. 29-91-83, the City Council considered and acted upon time and motion studies of 6 programs (12 films and assorted previews). Thereafter, Judge Hamilton considered 13 programs (26 films and assorted previews) which included 8 films which were subpoenaed after the preliminary injunction hearing had been set ("Teenage Pajama Party," "Breaker Beauties," "Kinky Tricks," "A Formal Faucett," "Roller Babies," "Summer of Laura," "Deep Throat," "Devil in Miss Jones") and 18 time and motion studies which had been prepared from films exhibited before such hearing date). At the hearing on the preliminary injunction, the Parties stipulated that there was no substantial difference between the 8 films in the four programs which were viewed by Judge Hamilton and the 18 films in the other nine programs. Judge Owens, however, refused to take judicial notice of the stipulation nor would he view the two films "Roller Babies" or "Summer of Laura," which had been the subjects of one of the controversies in the appeal of Case No. 25-65-30.

filed his "Memorandum of Intended Decision" in Case Nos. 28-12-14 and 29-91-83. In that decision, he ruled as follows:

(1) The six films which were viewed by the Court were obscene beyond a reasonable doubt. The films were hard-core pornography.

(2) Because the advertising and public exhibition of the films constituted a public nuisance, the City was entitled to an injunction.

(3) License revocation was denied because:

(a) None of the films upon which Resolution 78-131 was based were received in evidence. There could be no judicial determination. Without such determination the purported revocation could not stand.

(b) The resolution applied the wrong standard. Because the wrong standard was applied, the City had not made a valid finding to support a license revocation.

(c) Even if the resolution were valid, the purported license revocation constituted a prior restraint.

(4) There was no difference between judicial restraint and legislative restraint.

(5) The Court noted but would not follow Associate Justice Burke's dissent at footnote 4 in Perrine v. Municipal Court, 5 C.3d 656, 668.

(6) Plaintiff was entitled to costs.

19. The trial of Case No. 31-55-93 was held in Department 17 (Judge Owens) on September 1, 2, 3, 8, 10, 14, 15, 16, 17, 21, 22, 23, 24, 1981, and October 15, 19, and 20, 1981. The trial facts in Case No. 31-55-93 differed substantially from the trial facts in Case Nos. 28-12-14 and 29-91-83.

20. In Case No. 28-12-14, no films were received in evidence and only the time and motion studies and continuities of 12 programs were before the trial court. In Case No. 29-91-83, Judge Hamilton viewed 8 films which had been subpoenaed (programs 10-13) subsequent to the action by the City Council and there had been a stipulation that the other films (programs 1-9) were substantially similar to the eight which

had been viewed by Judge Hamilton. In contrast, Judge Van Tatenhove received in evidence and viewed, in addition to the time and motion studies and continuities for programs 1-14 (28 films) which had been before the City Council, 15 films and 8 previews (programs 15-23) which had been subpoenaed for the hearing on the motion for a preliminary injunction which was set subsequent to the City Council's action. In granting the preliminary injunction, Judge Van Tatenhove ruled the time and motion studies and continuities for programs 1-14 were admissible in evidence against the Mitchell Brothers' "best evidence" objection. That preliminary injunction had been affirmed upon the appeal which was final. Overruling a "law of the case" objection, Judge Owens refused to follow that ruling and admit the copies, but allowed the time and motion studies in evidence to "authenticate" the videotapes as "copies" upon which

he thereafter ruled. Judge Owens also granted the City's request that the Court take judicial notice of Finding of Fact #19 in Case No. 25-6-530, Plaintiff's Exhibit 15 (testimony of Dr. Anchell and Dr. Van den Haag re "harm" to the City).

21. On October 20, 1981, Judge Owens announced his "Intended Decision" from the bench in which he ruled that all of the films which had been viewed by the Court either in 35mm or videotape cassette form were obscene under California law.

22. By an order filed on January 22, 1982, Judge Owens approved a stipulation between the Parties and granted a stay of proceedings re settlement of the proposed findings of fact and conclusions of law in Case Nos. 28-12-14 and 29-91-83 (consolidated), and Case No. 31-55-93, pending the appeal in Case No. 25-65-30. A hearing on the settlement of proposed findings of fact and conclusions of law in those cases has

been set by Plaintiffs for May 6, 1986, at 9:00 a.m. in Department 18.

I declare under penalty of perjury that the foregoing is true and correct and was executed on this 25th day of March, 1986, at Sun Valley, California.

James J. Clancy
Attorney for Plaintiff

APPENDIX "C"

Partial Reporter's Transcript for July 31, 1986 in People ex rel. Gow, City Attorney of the City of Santa Ana v. Mitchell Brothers' Santa Ana Theatre et al., Nos. 28-12-14, 29-91-83 and 31-55-93, on the issue of "prevailing party" pursuant to Civil Code Section 3496, before Orange County Superior Court Judge Claude M. Owens.

(Reference: Amicus Curiae Brief of the City of Santa Ana, California in Support of Petitioners at page 22, line 22.

Partial Reporter's Transcript for July 31, 1986 in People ex rel. Gow, City Attorney of the City of Santa Ana v. Mitchell Brothers' Santa Ana Theatre et al., before Orange County Superior Court Judge Claude M. Owens.

Santa Ana, California, Thursday, July 31, 1986; 9:00 a.m.

(Whereupon all parties were then and there present, the following proceedings were had, to wit:)

(Partial Transcript.)

The Court: This is the Mithcell (sic) Brothers case.

(Partial Transcript.)

The Court: Regarding the objections to the proposed judgment for attorney's fees and the three cases pending, the Court rules as follows:

Case number 28-12-14, the Defendants are entitled to attorney's fees under Civil Code section 3496 as the prevailing

party.

Under cases 29-91-83 and case 31-55-93 neither side is entitled to fees. Neither side prevailed.

Miss clerk, that will be the extent of your minute order.

Now, the Court will explain its reasons, and the reporter will make a transcript of these remarks and they will then be filed in the file.

The rulings are based on these reasons.

Generally, attorney's fees may be recovered only when agreed to or when allowed by statute (CCP Section 1021; Nasser vs. Superior Court, 156 CA3 52, 56; 1 Witkin, Procedure, 3rd Edition, 151). In these cases there is no agreement for fees.

Of three possible statutes, only Civil Code 3496 is relevant.

CC 1717 is not relevant because these cases are not contract cases -- the prerequisite for that section.

C.C.P. 1021.5 is not relevant because no significant benefit is conferred on a large class of persons by the rulings in defendant's favor -- the prerequisite of subsection (a) of that section (Woodland Hills Retirement Association vs. City Council, 23 C3 917, 940; Pacific Legal Foundation vs. California Coastal Commission, 33 C3 158, 166; See the dissent in Press vs. Lucky Stores, 34 C3 311, 325, and qualification at footnote 7, of the majority's "assumption").

The benefit conferred by the rulings in defendants' favor was to permit the moving picture theater to continue to show obscene films. This is not a "significant benefit to a large class of persons."

C.C. Section 3496 does apply. That section requires that a party prevail to be entitled to fees.

In case number 28-12-14, defendants prevailed. The case was dismissed on motion for nonsuit for lack of evidence (see Palmer vs. Agee, 87 CA3 377).

In cases number 29-91-83, and 31-55-93, neither side prevailed, for both sides only partially recovered what they sought (Nasser, supra, page 58; See Reid vs. Valley Restaurant 48 C2 606).

Plaintiff succeeded in having enjoined the showing of many films. This took most of the trial time. Defendants succeeded in having the prayer for license revocation denied.

Which aspect was more significant would depend on one's point of view.

Gentlemen, thank you.

APPENDIX "D"

Orange County Register News articles dated Sunday, August 17, 1986, reporting on City of Santa Ana Mitchell Brothers' Santa Ana Litigation, entitled: "After 10 years, Santa Ana questions its fight." And "The Mitchell Brothers: From Small-Town U.S.A. to Big-Time Pornography."

(Reference: Amicus Curiae Brief of the City of Santa Ana, California in Support of Petitioners, at page 24, line 18 herein).

A4 The Orange County Register Sunday, August 17, 1986

After 10 years, Santa Ana questions its fight

By Anita Snow
The Register

SANTA ANA — Ten years and more than $300,000 later, some City Council members are beginning to wonder if they haven't been wasting their time trying to shut down the X-rated Mitchell Brothers Theater.

"I'm ready for us to do something about this," City Councilwoman Patricia McGuigan said. "I feel we've been spending a lot of money on this and I don't think anything is coming of this.

"I'm beginning to think we're pouring water down an empty hole."

Council members on Monday will get a chance to re-evaluate their earlier support of a plan to revoke the theater's business license.

During a closed session, the group is scheduled to discuss an Orange County Superior Court judge's ruling earlier this month that Santa Ana must pay the theater's legal fees, estimated at $1.2 million, in a 1976 case.

Later that evening, a group of Santa Ana residents is scheduled to present council members with a petition encouraging continuance of the legal battle to kick the Mitchell Brothers out of town.

"We're very concerned about it," said Gloria Turtenwald, who is among the residents who live north of the theater planning to show up for the Monday night City Council meeting.

"We think this could be a test case and we don't want them to give it up," Turtenwald said.

Some council members' concerns that too much money has been spent and some residents' fears that the battle may be dropped stem from an Aug. 6 Orange County Superior Court ruling in which Santa Ana was declared the loser.

Judge Robert J. Polis ordered Santa Ana to pay Mitchell Brothers' legal fees they have incurred fighting a lawsuit the city filed in 1976 in hopes of closing the theater.

Although Mitchell Brothers' attorneys have estimated that those fees could run as high as $1.2 million, Polis must later approve that figure.

"Those kinds of dollars just aren't around," Councilman Robert Luxembourger said. "There's no point in spending that kind of money on creating case history."

Like McGuigan, Luxembourger said that ruling has forced him to begin to rethink his earlier support of the court battle. Earlier this year, even before the ruling, Vice Mayor P. Lee Johnson said he was concerned too much money and time had been spent on the case.

Mayor Dan Griset and Councilmen Wilson Hart and Dan Young have declined to comment on the ruling until they have a chance to discuss it with City Attorney Ed Cooper.

Only Councilman John Acosta has said he is committed to continuing the battle against the Mitchell Brothers, regardless of cost. "Morality does not have a price," Acosta said. "We must protect the moral values of the community."

To wage its war, the city contracted with attorney James Clancy in 1976. Clancy has said he would appeal the most recent ruling and is worried the city may give up the battle.

"The Mitchell Brothers' attorneys just made that ($1.2 million figure) up for the headlines," Clancy said. "They are just trying to scare the city into changing its mind."

Santa Ana already has spent $308,000 during the past decade to fight Mitchell Brothers, City Attorney Ed Cooper said.

Clancy estimated that about 60 percent of that figure has gone to pay for "out-of-pocket expenses," such as the purchase and processing of film used by a retired Los Angeles police officer to take pictures surreptitiously of the theater's movies to provide evidence in the 10-year court battle.

Clancy said he received the rest to represent the city in court. He filed five lawsuits against the theater between 1976 and 1985 and has filed one a week for each new film shown there since February.

The city initially paid Clancy $25 an hour in 1976 and is paying him $50 an hour today, Cooper said.

Council members said that any decision they make on the Mitchell Brothers case could be a politically dangerous one. They worry that some taxpayers will think they are spending too much money if they continue the battle and offend the moral sensibilities of others if they decide to throw in the towel.

"It's a sticky political situation." McGuigan said. "You're either for pornography or you're for wasting the taxpayers' money.

"Which is worse?"

Despite the political risks, two men who were on the City Council when the battle first started a decade ago think its time the current council members re-evaluate their former support of the battle to shut down the theater.

"It's astonishing to me how they've gone on and on," Vern Evans said. "When we first started, we felt confident that the judges and courts would be in support of trying to stop all this nonsense. It just didn't work out that way."

Gordon Bricken, who was among those who marched in protest outside the theater in late 1975 and early 1976, said: "They've been doing it for so long, I don't think anyone, including the council, the courts and everyone else, is sure why they're even doing it anymore.

It's time, Bricken said, that the city give up the battle.

"It has lasted 10 years only because we've failed to be successful."

The Mitchell brothers: From small-town U.S.A. to big-time pornography

By Gregg Zoroya
The Register

SAN FRANCISCO — Missy Manners blinks her brown eyes attentively, shifting her figure beneath a clinging, transparent gown, and strains to answer over the din of an opening-night celebration of pornography.

"I would not work with anyone else in the adult film industry besides the Mitchell brothers," said the 24-year-old former Senate page and campaign worker for President Reagan.

The bosomy right-winger's decision to bare all for Jim and Artie Mitchell's latest porn production was a national news item. It doubled as lucrative publicity for the brothers from Antioch, who have the city of Santa Ana with its back to the wall.

While the television cameras ogled her arrival for the premiere earlier this month at the Mitchells' O'Farrell Theater, she began blasting Attorney General Edwin Meese and his Commission on Pornography. The brothers looked on like proud papas.

It wasn't just the publicity. She was thumbing her nose at the ruling class and that has been a popular pastime for the two middle-aged siblings who are among the most successful pornographers in the country.

The Mitchells' non-conformity has served them well in their never-ending task of defending their vocation in courtrooms from Texas to Santa Ana, where their X-rated theater has been under legal siege by the City Council since 1975.

In his rimless glasses, the balding, mustachioed Jim, 42, is the perennial civil dissenter, who forged a steely irreverence and rock-hard resistance to established authority during his '60s-protest years at Berkeley. He and his younger brother by two years, who shares a similar, if less heady version of dissidence, are remnants of the flower generation.

Perpetual protesters though they may be, Jim and Artie also are an American success story. The two are products of small-town U.S.A., who parlayed a $10,000 loan in 1969 into a porn empire that has generated millions. (They're evasive on specifics.) The Mitchells regularly outspend their competitors to make their movies and they are unafraid at dropping a similarly sized bundle to stop legally the ripoff artists and to fight city halls.

"We've always been in an independent mode from the rest of pornography," Jim said. "We don't think we're any better than anyone else. But we always cared about what we were doing."

Apart from the business, the Mitchells contribute to a variety of San Francisco charities, including Save the Cable Cars. Proceeds for the most recent premier went to a hospice program for victims of AIDS.

BEST A

When they're not on an occasional holiday with their children, they fish commercially each morning near the Golden Gate Bridge and tend to the pornography in the afternoon. Artie's a Democrat; Jim's a Libertarian. Both drive a Mercedes.

They share a strong love for their children, 10 in all, and they have a unique appreciation and close reliance upon one another as brothers.

"Actually, he's a good brother. Took me everywhere. Took good care of me," Artie said.

"We're 50-50 partners," Jim said.

They don't fit the stereotype of pornographers. There are no gold chains and polyester suits. Both are a compact 5 feet 9 inches and they are comfortable in denim, cotton pullovers and running shoes. For the gala event at the O'Farrell theater, Artie opted for a conservatively cut gray suit, white shirt and purple tie. Jim stayed casual.

Artie, with his neatly trimmed beard and deepening crow's feet, is more weathered and the freer spirit of the pair. He starred in their first porn film (the male lead failed to show), has shed two wives while Jim is on his second, and outlasted his older brother on opening night, partying to 6 a.m.

"They are very fun and they're very bright," Manners said, sipping champagne from her perch atop a carpeted dance pedestal in the theater's garishly decorated Green Door room.

Jim and Artie plan to market her schoolgirl exuberance in their latest release, "Behind the Green Door — the Sequel," in every sex-hungry corner of the land, including Santa Ana.

"She doesn't have that glossy, hard look," said Jim of his new star, who appears in a fleshy scene with three men on a trapeze and who later encounters a hard-breathing satyr, a half-man, half-goat.

The movie is billed as a sequel to the brothers' fabulously successful original "Behind the Green Door," which starred Ivory Snow detergent-box cover girl Marilyn Chambers. The new version has a novel theme: safe sex. Virtually every intimacy is separated by some form of latex.

"It's supposed to be a primer for other pornographers to follow," Jim said.

"The film has a decidely clinical flavor with all the squeaky rubber," noted Chronicle critic Gerald Nachman, in what was not the only negative review of the new release. "I've been more turned on at Walgreens."

But Manners, whose real name is Elisa Florez, was undeterred.

"I hope to come down to Santa Ana and do a premier like this," she said, surveying the eclectic mixture of Bay-area citizenry, a mixture of purple-haired punks and pin-striped gentry nibbling pate and erotic pastries.

Then she smiled wickedly.

"We'll have a great ... show."

The remark, containing an expletive, was borne of confidence that came easily as she lounged on her opening night in the brothers' citadel of seduction.

This emporium of erotica on O'Farrell Street — with its maze of entertainment rooms — offers X-rated films, striptease acts and simulated sex shows for a $25 entry fee during evening hours.

After 18 years of nearly uninterrupted operation — despite on-again, off-again run-ins with City Hall — the brothers have earned a grudging acceptance by many in the city.

"We sort of take them for granted now. They're part of the scenery ... part of the cultural activities," San Francisco Examiner columnist Herb Caen observed after dropping in on the premier.

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"(It's) the Opera House, Symphony Hall, the Mitchell Brothers, in that descending order," he mused, "although the (art) museum's in there somewhere."

Such a reputation doesn't wash in Santa Ana, where the brothers are known by only their last name, their dirty-movie theater at the Honer Plaza shopping center and the city's current legal war — its latest strategy is filing a lawsuit per week — aimed at closing them down.

"What happens there (in Santa Ana) is very convoluted. It doesn't make any sense," Jim said. "We were warned when we went into Santa Ana (in 1975). It basically has a real tough reputation, as tough as some of the Southern towns in the early desegregation batties.

"It's good business is why we went to Santa Ana and stayed," he added. "Santa Ana runs the risk of becoming either a model (at combating pornography) or the laughing stock of the nation on how not to do it."

It's a personality trait of the older brother that he launches into a sarcastic analysis on those government authorities who label their craft "obscene" and the brothers "smut kings."

"We're at the very bottom. We're the muck that they have to get rid of," he said.

It's like he's back at Berkeley, fist still raised, fighting for the cause. Only this time, it isn't anti-war, it's pro-First Amendment and its guarantee of free expression.

"If they can get us, I'll guarantee you (in the press), you're not far behind," he said. "We're going to go on the (legal) offense only because we know there's nobody waiting in the wings to save America."

And what of the current administration with its porno-fighting attorney general and Supreme Court nominees?

"They've got to be careful or they're really going to wreck a couple of hundred of years of Constitution," Jim said. "When you take anything, your court or any of your government, and you swing it over to one side it goes to (expletive). They're too greedy. They go, 'We want it all,' and you don't get it all."

James Lloyd and Artie Jay Mitchell believe they have something to lose.

They were born of Scottish, Irish and American Indian heritage (Choctaw and Cherokee). They were the only children of an elementary school teacher and a professional gambler who skirted the law and spent time on a Texas chain gang before he came west. Georgia Mae was 19; Bob was 35.

Dad taught the boys a few hard lessons, such as there's no free lunch; mom took them to church — a fundamentalist Assembly of God chapel in Antioch.

"By the time we were 9 or 10, they couldn't make us go," Jim said.

Both parents left them with honest, uninhibited notions about sex.

Artie is convinced it's one secret to their pornographic success.

"I don't feel guilty about sexuality or pictures of it," he said. "I realize there are people ... who get a terrible knot in their stomach that they can never get rid of and I feel sorry."

Their father died in 1973 of a heart attack. Their mother is retired and lives near Sacramento.

"Our family was always tight," Jim said. "Whatever we did would be fine, as long as you called home."

Antioch was a village of only a few thousand in those days and there was one sure way of escape. Both boys joined the Army, Jim

first and Artie after he got an associate degree at Diablo Valley College in nearby Concord.

When Jim was discharged in the early '60s, he enrolled at the University of California, Berkeley, a political science major with a minor in film.

In the midst of the Vietnam anti-war protest during his senior year, Jim joined a student body strike and left school.

"I remember the last day, they (the police) were chasing us with their batons and we'd been throwing rocks at 'em to get them started. We had taken over the administration building, shut 'em down. We were anti-war, the revolution was now."

Viewing the televised carnage in Vietnam, Jim had little difficulty in cultivating an irreverent dislike for government.

He took a job part-time at a San Francisco theater showing black-and-white adult movies.

"In those days ... you didn't see too much mixing up in it," he recalls. "That gave us a little idea that anybody could do a better job at this."

Who was going to tell them it was morally wrong, he asked, a government knee-deep in Vietnam?

When Artie was discharged after serving much of his tour in West Germany, he and Jim enlisted a small group of Antioch high-school chums and started the business. The Mitchell Brothers' O'Farrell Theater, at 895 O'Farrell St., opened on July 4, 1969. He was 26; Artie, 24.

In the beginning, improving the art form was simple.

"All the girls in the movies were hippies and they all had dirty feet," Jim recalled. "The big thing became to have a girl without dirty feet."

"(So) we would have her wash her feet," Artie said.

They say they've always drawn the line at child porn, bestiality and violence. But there was one area they embraced early on: hard-core sex.

"We knew the people wanted that," Artie said. "Business was phenomenal."

Despite intermittent raids by San Francisco police, the brothers undertook a hectic pace of producing two X-rated films every week.

They would ultimately introduce or employ such porno stars as Erica Boyer, Harry Reems, John Holmes, Annette Haven and Ginger Lynn.

(Even porn queen Traci Lords participated in a 1985 Mitchell brothers' film. The young star made national news when it was revealed she was under age. The brothers quickly trimmed her eight-minute appearance from the movie when the news broke.)

By the time they made the original "Behind the Green Door" in 1973, it was their 332nd production. The $86,000 film is estimated to have earned $25 million since its release in 1973.

Not much of that filtered back to the brothers, they said. Their on-again, off-again business sense and never-ending legal costs have combined to keep them from becoming millionaires.

"I've never seen them wanting for money," business associate Jeff Armstrong said.

But, adds business manager Vince Stanich, "A lot of money has come in and a lot has gone out."

The Mitchells tried to avoid paying taxes on the huge income spawned by the orginal "Green Door" by plowing proceeds into new productions. They spent a record $450,000 on "Sodom and Gomorrah" and created a flop.

In the late '70s, the Mitchells reduced their string of theaters from

11 to four (two in San Francisco, one in Haywood and one in Santa Ana), stopped making films and began relying on video-cassette production, film distribution and commercial fishing.

"Sometimes it's real nice out there," Artie said of fishing off the coast for halibut.

"It keeps you alive for the fight," Jim said.

During the early '70s, when the bootleggers tried to capitalize on the success of such Mitchell brothers' films as "Green Door," the men chose a tactic that was unheard of in pornography: copyright.

After six years of litigation, federal appeal judges granted them their copyright in 1979 and the U.S. Supreme Court left the decision alone. The Mitchells had made case law.

"That's a great one," Jim said. "When that one came in we all had 30 seconds of silence."

There also were legal upsets. When a San Francisco judge found them in contempt of court in 1982 and sentenced them to jail for allowing their dancers to engage in prostitution at the O'Farrell, the brothers appealed. The case is before the state Supreme Court, housed just four blocks from the O'Farrell theater.

With the millions of videocassette recorders in American homes today, the brothers started making movies again last year and the "Green Door" sequel is their second major comeback production.

They want to bring the film to Santa [illegible] where their lease runs out on [illegible], 1990. The brothers see renewal as doubtful. The notion is enough to spark the Mitchells into a little stand-up comedy.

Artie: "We'll probably still be there, going about our business of collecting the millions they owe us (in attorneys' fees)."

Jim, (with exaggerated effect): "Ha, ha, ha. Yeah, we'll take the Greyhound down, right?"

Artie: "Yeah, I'll volunteer to come down and see how our case is going ... we're not about to walk away at this point."

Jim: "We'll be there with walking canes."

Artie: "I wish they had a few more restaurants in Santa Ana."